Supreme Court, U.S.
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CLERK

89-311
No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether an administrative agency in making a decision, and a court of appeals in approving that decision, must address a district court's opinion, issued while the administrative proceeding was in rehearing, in which the district court made a factual finding that the agency's conditions created an unreasonable barrier to competition, and that finding irreconcilably conflicts with the administrative agency's ultimate decision.

PARTIES TO PROCEEDING BELOW

In addition to Consolidated Gas Company of Florida, Inc. and the Federal Energy Regulatory Commission, Florida Gas Transmission Company (a subsidiary of Sonat, Inc. and Enron Corp.) was a party in the District of Columbia Circuit proceeding to which this petititon for certiorari is directed.

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FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, Consolidated Gas Company of Florida, Inc. (Consolidated) prays that a Writ of Certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered in *Consolidated Gas Company of Florida, Inc. v. FERC*, No. 88-1321 (D.C. Cir. March 8, 1989) and the denial of Consolidated's Petition for Rehearing on May 17, 1989. This Petition requests review of the Court's decision approving the Federal Energy Regulatory Commission's (FERC) order requiring that Consolidated pay the cost of construction for a lateral pipeline and meter station connecting Consolidated's system with the Florida Gas Transmission Company (FGT) pipeline, specifically the failure of the Commission and the Court to address the

anti-competitive effect of imposing the cost of construction on Consolidated.

OPINIONS BELOW

The present case involves five agency decisions and three court decisions.

(1) **The Initial Decision of the Administrative Law Judge** —In the initial decision issued on November 21, 1983, 25 FERC ¶ 63,039 (1983), the Administrative Law Judge (ALJ) ruled that Consolidated's connection application should be granted and that FGT should be required to absorb the cost of the lateral line required to connect the FGT pipeline to Consolidated's system. The ALJ found that the FGT tariff did not require a new customer to pay the cost of a new lateral, and thus FGT's tariff did not comply with the Commission's regulation which requires that a tariff include a specific statement that full contribution is required from all customers, if that is the pipeline's policy.[1] The barrier to competition posed by the necessity of obtaining agency authorization for Consolidated to obtain a supply of natural gas, and the Commission's failure to set the application for a prompt hearing, allowed City Gas Company of Florida, Inc. (City Gas) to invade Consolidated's market. The issue of unfair competititon by City Gas was brought to the attention of the ALJ, who ruled:

> Fleisher also testified that the application should be granted so that the Commission does not "aid and abet" the anti-competitive efforts of City Gas (Ex. 1, p. 7, and Ex. 14, pp. 4–5). An acrimonious dispute between Con Gas and City Gas attributable to the loss by Con Gas of its 8 commer-

[1]FERC regulations require an explicit statement in a tariff stating "the company will not build or contribute to the cost of building any sales lateral pipelines to resale customers." 18 CFR 154.39(b)(2). FGT's tariff did not contain such a statement of policy.

> cial customers and 70 residential customers to City Gas culminated in pending litigation in which Con Gas alleges that City Gas has violated the federal antitrust laws. Violation of the policies underlying these federal laws is germane to disposition of a section 7 application.

25 FERC ¶ 63,039 at 65,105 (1983) (citations omitted).

The ALJ recognized the obligation of the Commission to address anti-competitive aspects of agency action. By issuing a prompt decision ordering FGT to provide Consolidated with a supply of gas, and to absorb the cost of the connection into the pipeline's investment rate base, the ALJ opened the door to fair competition.

(2) **The Commission's Initial Decision**—By Opinion and Order No. 225, dated September 20, 1984, the FERC ordered FGT to construct the connection, but the Commission reversed the ALJ's conclusion that FGT should be required to pay for the lateral and ordered Consolidated to reimburse FGT for the full cost of the lateral and meter station to be constructed by FGT. 28 FERC ¶ 61,358 (1984). The Commission denied Consolidated's petition for rehearing in Opinion No. 225-A issued November 19, 1984, 29 FERC ¶ 61,205 (1984).

(3) **The First Appellate Court Decision**—In an unpublished opinion issued March 4, 1986, the United States Court of Appeals for the District of Columbia Circuit vacated the FERC orders, and remanded the case to the FERC for an explanation of the condition imposed on Consolidated. *Consolidated Gas Company of Florida v. FERC*, No. 85-1040 (D.C. Cir. March 4, 1986).

(4) **The Commission's Decision on Remand**—In response to the remand, on March 30, 1987, the FERC issued Order 225-B, in which it summarily reaffirmed the condition in its initial order. 38 FERC ¶ 61,137 (1987). In its Application for Rehearing filed April 29, 1987, Consolidated again asserted that the Commission had failed to recognize the anti-competitive impact of its order on Consolidated and that to pay the cost of the lateral, when Consolidated's competitor, City Gas, had received numerous laterals at FGT's expense, would seriously jeopardize Consolidated's ability to compete with City Gas and to recover the residential and commercial customers taken over by City Gas while the FERC had blocked Petitioner's access to a natural gas supply. (JA 167, 171-2).

(5) **The United States District Court Decision**—On July 24, 1987 the United States District Court for the Southern District of Florida, in a separate but related antitrust action, found that the Commission's order requiring Consolidated to pay for the cost of a direct connection to the FGT system was anti-competitive. *Consolidated Gas Company of Florida v. City Gas Company of Florida,* 665 F.Supp. 1493 (S.D.Fla. 1987), *appeal docketed,* No. 87-6108 (11th Cir. Dec. 30, 1987). The district court stated:

> during 1984, City Gas began providing service to seven commercial accounts in a shopping center adjacent to Consolidated's service area. Thus, it **became crucial that Consolidated convert to natural gas for as low a cost as possible in order to be able to offer rates that were competitive with those City Gas could offer.** In order to compete effectively, Consolidated believed it was imperative that FGT provide Consolidated with a first connection to the natural gas pipeline at FGT's cost.

> The amortization of the estimated $250,000 capital cost of this lateral pipeline would have increased Consolidated's cost of securing natural gas by approximately five cents per therm. [Tr. 6-91-92]. City Gas has already received approximately ten such connections with FGT at no cost and thus it did not have similar expenses driving up its natural gas rates [Tr. 5-187-188].
>
> Faced with these problems, Consolidated was left with three potential courses of action if it was going to remain in business: (1) obtain a FERC allocation and hope it could convince FGT to pay for the lateral pipeline connection; (2) connect a pipeline to City Gas' pipe and purchase gas directly from City Gas; or, finally (3) obtain a FERC allocation, connect a pipeline to City Gas' pipe, and pay City Gas the cost of transporting gas through City Gas' pipes. Two of these courses of action required Consolidated to deal directly with its future competitor, and **the third alternative, as the facts reveal, involved unreasonable delays and uneconomically high expenses.**

Id. (emphasis added).

> We also find, significantly, that City Gas had monopoly power due to the presence of high barriers to entry. **Costs and delays imposed by the regulatory process are important barriers to entry.**

Id. at 1520 (emphasis added).

> First City Gas, a monopolist, controlled an essential facility—a pipeline that transported wholesale gas. Prior to 1984, when Consolidated received a FERC allocation, Consolidated could

not have purchased wholesale gas from anyone except City Gas. **After 1984, Consolidated could have purchased from** City Gas or **FGT, but would have encountered a prohibitive transportation problem if it had chosen the latter. A lateral pipeline connecting Consolidated facilities to the FGT main would have cost $250,000, or approximately five cents per therm. There is grave doubt as to whether Consolidated could have effectively competed with City Gas based on these additional expenses,** and there is also a serious question as to whether the FPSC would have approved such an increased cost based on an uneconomical duplication of City Gas' existing line.

This concern leads us to the second part of the **MCI Communications Corp.** test—whether Consolidated could practicably or reasonably duplicate the essential facility. In the AT&T line of cases, duplication of the local exchange facilities would obviously be much more expensive than duplication of City Gas' lateral pipe. In *Otter Tail*, a case which is factually more similar to this case than are the AT&T cases, however, the Court did not even suggest that the municipalities should attempt to duplicate the electric transmission lines. Although the Court did not indicate the cost involved, we believe this to be highly supportive of a finding that such facilities cannot be reasonably duplicated. In *Aspen Skiing Co.*, the Tenth Circuit found that duplication was unreasonable "due to regulatory restrictions, and delays, and the expense and time required." 738 F.2d at 1521. The same is true here.

> **Consolidated should not have had to wait two years to get FERC approval for a natural gas allocation. Additionally, it would have been unreasonable to require Consolidated to spend $250,000, which would potentially have made it uncompetitive with City Gas, to duplicate City Gas' lateral pipe.** "To be 'essential' a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants." *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), cert. denied, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d. 1121 (1978) (footnote omitted). We find that such duplication would have been impractical and unreasonable and would have severely, if not fatally, handicapped Consolidated's potential entry into the natural gas market.

Id. at 1534 (emphasis added).

(6) **The Commission's Final Decision**—The FERC denied Consolidated's Petition for Rehearing on March 2, 1988 in Opinion No. 225-C, 42 FERC ¶ 61,271 (1988), and refused to address the anti-competitive aspect of the order. Because the district court's decision was issued after Consolidated's Petition for Rehearing was filed, and the Commission's Rules of Practice do not authorize filings after a Petition for Rehearing has been filed, the district court's decision was not formally before the Commission, but copies of that decision were provided to the Commission's Staff, at the Staff's request, shortly after its issuance in July, 1987.

(7) **The Court of Appeal's Second Decision**—A second appeal was then heard by the United States Court of Appeals for the District of Columbia Circuit. *Consolidated Gas Company of Florida, Inc. v. Federal Energy Regulatory Commission,* No. 88-1321 (D.C. Cir. March 8, 1989). In an unpublished opinion, the Court rejected the Commission's argument that to treat Consolidated differently under Tariff II amounted to presumptive discrimination. The Court noted:

> This position contradicts, without explanation, the one set forth in the Commission's **Statement of Lateral Line Policy in Rate Schedules Filed by Natural Gas Pipeline Companies,** which asserts that '[t]here is nothing inherently objectionable in a policy statement which creates separate sets of criteria with respect to new and existing purchasers . . .' 40 F.P.C. 46, 48 (1968).

Consolidated v. FERC, No. 88-1321, slip op. at 4 (D.C. Cir. March 9, 1989). Nevertheless, the Court accepted a rationale offered by FERC counsel at oral argument that only in a period of expansion should a transmission pipeline pay for the necessary lateral construction in seeking additional customers. If the pipeline was functioning at capacity, said Commission Counsel, then a new customer would not bring any benefit to the system, therefore the costs should be borne by the customer even though the pipeline's tariff did not impose such a requirement. *Id.*

Petitioner's arguments that the Commission's order was anti-competitive, Petitioner's Opening Brief at 26-30, and Petitioner's Reply Brief at 15-17, *Consolidated Gas Company of Florida, Inc. v. Federal Energy Regulatory Commission,* No. 88-1321 (D.C. Cir. March 9, 1989), were ignored by the court of appeals although the issue was before the court.

Consolidated's Petition for Rehearing was denied without opinion on May 17, 1989.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 9, 1989. Consolidated's petition for rehearing, filed April 24, 1989, was denied without opinion on May 17, 1989. This petition for a writ of certiorari was filed within 90 days of the latter date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case arises under the Natural Gas Act §§ 4, 7 and 19, 15 U.S.C. § 717 (1982); the Commission's Regulation General Terms and Conditions § 154.39, 18 C.F.R. § 154.39 (1988), and the Administrative Procedure Act, 5 U.S.C. § 706 (1982). The statutory provisions are included in Appendix I to the petition.

STATEMENT OF THE CASE

The underlying factual issue in the instant case is a dispute over who should be required to pay for a connecting, or "lateral," natural gas pipeline between the supplier, FGT, and the wholesale purchaser, Consolidated. Consolidated has consistently argued throughout the proceedings that for Consolidated to pay for the lateral would be unduly burdensome and anticompetitive. The FERC has nevertheless required Consolidated to pay the cost of the lateral, even though this cost amounts to nearly half of Consolidated's net investment in its plant and would be beyond Consolidated's ability to support.

As a result of this condition imposed upon Consolidated by FERC, Consolidated has been denied access to natural gas. This denial has forced Consolidated to continue to distribute high-cost propane gas to its customers, which must be shipped to Consolidated by truck. Under these circumstances, Consolidated has lost a significant portion of its customers to its competitor, City Gas. City Gas has eleven laterals with FGT, all of which have been provided at FGT's expense.

Indeed, City Gas intervened in the administrative proceeding between Consolidated and the FERC, and argued that Consolidated should be denied access to natural gas, that City Gas should be allowed to take over Consolidated's customers, and that Consolidated should either sell its system to City Gas at a fraction of its value, or simply be driven out of business. City Gas then extended its line through Consolidated's territory, captured all of Consolidated's commercial, as well as some of Consolidated's residential, customers, and City Gas further refused to transport natural gas for Consolidated at a reasonable price.

In response to City Gas' actions Consolidated initiated a separate action in the United States District Court for the Southern District of Florida against City Gas, in which Consolidated asserted that City Gas' actions violated the Sherman Act. The district court held that City Gas was in violation of the Sherman Act, and, in addition, the court found that the FERC's conditions imposed upon Consolidated created an insurmountable barrier to access to a natural gas supplier, and was therefore anticompetitive.

Despite the district court's findings, the FERC has refused to acknowledge the antitrust implications of its position with respect to Consolidated, and, in upholding the

commission, the United States Court of Appeals for the District of Columbia Circuit also has failed to acknowledge the irreconcilable conflict between the district courts finding and the FERC's condition.

REASONS FOR GRANTING THE WRIT

The essential issue in this case is that a district court's finding of fact, in an opinion after a full trial, that an administrative agency's position is in violation of Federal antitrust law, must be addressed by the agency in making any further decisions in the matter, and the appellate courts in reviewing those decisions cannot ignore the district court's findings.

An agency, and a court reviewing an agency decision, cannot ignore a relevant ruling in an antitrust case holding that the agency decision is an insurmountable obstacle to competition. The Supreme Court has consistently held that Federal regulatory agencies *must* consider anti-trust policy in rendering decisions to evaluating public convenience and necessity or the public interest. *McLean Trucking Co v. United States*, 321 U.S. 67 (1944); *California v. FPC*, 369 U.S. 482 (1962); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *FMC v. Svenske Amerika Linien*, 390 U.S. 238 (1968); *Northern Natural Gas v. FPC*, 399 F.2d. 953 (D.C. Cir. 1968). If the matter pending before the agency has serious anti-competitive effects, that aspect must be outweighed by compelling public interest factors before the agency can issue a certificate or license authorizing or requiring an action to be taken. *Northern Natural Gas Company v. FPC*, 399 F.2d. 953, 960-1, 977 (D.C. Cir. 1968); and see *Municipal Elec. Ass'n of Mass. v. FPC*, 414 F.2d. 1206 (D.C. Cir. 1969); *cf. United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 369 (1967). This obligation extends to FERC which is mandated in administering § 7 of the Natural Gas Act, 15 U.S.C. § 717 (1982), to give consideration to the

policies of the Clayton and Sherman Anti-Trust Acts. *California v. FPC*, 369 U.S. 482; *Northern Natural Gas v. FPC*, 399 F.2d. 953. The FERC must examine the implications of its approval of any pipeline expansion or tariff to ascertain whether the ultimate effect of that action is anti-competitive. *Central Iowa Power Cooperative v. FERC*, 606 F.2d. 1156, 1162, 1163 (D.C. Cir. 1979). If the action is evaluated as anti-competitive, then it cannot be approved.

In *Gulf States Utilities v. FPC*, 411 U.S. 747, 760 (1973), the Court stated:

> Consideration of antitrust and anticompetitive issues by the Commission moreover, serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings.

Had the Commission been mindful of this threshold responsibility, the ultimate monopolistic damage quantified in *Consolidated Gas Company of Florida, Inc. v. City Gas Company of Florida, Inc.*, 665 F.Supp. 1493 (S.D. Fla. 1987), might not have occurred and most certainly would have been mitigated.

But in this case, FERC not only failed to carry out its mandated role, it affirmatively violated statutory standards by incorporating an anticompetitive condition in its order. By imposing the heavy cost of the lateral upon Consolidated, the Commission severely prejudiced Consolidated's efforts to regain customers lost to its competitor, City Gas, during the prolonged administrative proceeding. The Commission's action in imposing the cost of the lateral upon Consolidated instead of FGT, failed to protect Consolidated as required by **Northern Natural**, thereby enabling City Gas to maintain its virtual monopoly power in the relevant market area.

The Commission alluded to an illusory anti-competitive dilemma in its opinion No. 225-C and Order Denying Rehearing stating:

> We need not inquire into potential damages to Consolidated's competitors because the discrimination would be patent on its face.

42 FERC § 61,271, at 61,854 (1988). But the Commission failed to consider the very real anti-competitive effects of its own order imposing the heavy burden of the lateral cost on Consolidated.

The Commission's action of imposing the cost of the connecting lateral on Consolidated, when the competing dominant seller in the area, City Gas, had received numerous supply laterals at the pipeline's expense, severely prejudiced Consolidated's competitive position. Under the Commission's order Consolidated would have to pay not only the cost of its own lateral, but also its share of the cost of City's numerous laterals which are incorporated in FGT's cost of service. Therefore Consolidated's competitor was put at a distinct advantage; its rates do not reflect the construction cost for the laterals it received nor will its customers have to shoulder the burden of the system's cost of a new lateral, whereas Consolidated's customers must bear both.

The concept of a "level playing field" on which competitors can compete on equal terms has been adopted time and again by the Commission. The Commission, in the past, has found some of FGT's tariff provisions to be in conflict with basic anti-trust acts. *Florida Gas Transmission Co.*, 47 F.P.C. 341, 377-8 (1972). Where a pipeline's tariff contains a provision that unduly restricts the market area of a local distributor the Commission has ordered such a provision stricken from the tariff. *City of Florence, Ala. v. Tennessee Gas Pipeline Co.*, 24 FERC ¶ 61,395 (1983). Yet the Commission's ruling in this case tipped the

playing field radically against Consolidated and gave its competitor an unfair advantage. Far from demonstrating that allowing Consolidated to receive its lateral at the pipeline's expense would grant a cost advantage to Consolidated and do competitive harm to City Gas, the facts demonstrate that imposing the cost of the lateral on Consolidated will inflict significant competitive harm on Consolidated.

These anti-competitive implications have been ignored by FERC and the U.S. Court of Appeals for the District of Columbia in refusing to directly address or rule on these grounds. However, in the related case, *Consolidated v. City Gas*, 665 F.Supp. 1493, the Court expressly and unequivocably determined that Consolidated fell victim to anti-competitive practices as a direct result of the Commission's order.

In failing to address the issue of competititon, both the Court of Appeals and FERC have not only encouraged prohibited anti-competitive activity, but have also placed themselves in direct conflict with the findings of the Florida federal court.

Although the anti-competitive aspect of requiring Consolidated to pay for the connecting lateral and meter station was raised before the Commission and the Court in the initial and the second appeal, the primary argument was addressed to the tariff itself. Very simply, FGT's basic tariff, Section 5, stated that FGT would install, own and operate the meter station at the point of delivery (elsewhere defined as the "city gate") "except as provided in Section 14." The referenced Section 14 specifically required only "existing customers" to pay for any new laterals that they receive. FGT's witness testified that the "intention" was to require all customers to pay the cost of laterals and speculated that a new tariff sheet was required to express that intention. (JA 30-33). Consolidated argued throughout that the express tariff language was control-

ling and did not require Petitioner to pay for the lateral to the city gate and the meter station, and that the tariff could not be "interpreted" to require all customers to pay for lateral costs because the FGT tariff did not contain the language expressly required by § 154.39(b) of the Commission's Regulation General Terms and Conditions, 18 C.F.R. § 154.39(b) (1988), if that was FGT's intended policy.

This Honorable Court is not asked to review the issue of interpretation of the tariff, nor the complex issue of undue discrimination. The sole question to this Court is: Under prevailing law, if a U.S. District Court in a litigated antitrust proceeding between two competing retailers finds that an agency action creates such an obstacle to one retailer's access to a supply of the product it requires that it is compelled to seek its supply through its competitor, which then demands a monopolistic price for the product, is the agency required to re-examine its action and to find that an overwhelming public necessity justifies imposing the anticompetitive condition in the order?

The answer, under long standing precedent is that the agency must weigh the anticompetitive impact of its order and find that some dominant public necessity requires the action. No such consideration was given by the Commission.

CONCLUSION

Wherefore, the Court should order that the Commission's decision be vacated and the matter remanded with instructions that the Commission consider the anticompetitive effect of its order, as determined by the United States District Court in the related case of *Consolidated Gas Company of Florida, Inc. v. City Gas Company of Florida, Inc.*, 665 F.Supp. 1493.

Respectfully submitted,
Consolidated Gas
Company of Florida, Inc.

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FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

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Appendix H—INITIAL DECISION (November 21, 1983) A-36

Appendix I—STATUES INVOLVED A-61

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1321

SEPTEMBER TERM, 1988

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

FLORIDA GAS TRANSMISSION COMPANY,
Intervenor

BEFORE: Ruth B. Ginsburg, Silberman and Buckley, Circuit Judges

ORDER

FILED MAY 17, 1989

Upon consideration of petitioner's petition for rehearing filed April 24, 1989, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: Robert A. Bonner
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1321

SEPTEMBER TERM, 1988

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Petition for Review of Orders of the Federal Energy Regulatory Commission

Before Ruth B. Ginsburg, Silberman, and Buckley, *Circuit Judges.*

FILED MARCH 8, 1989

JUDGMENT

This case was considered on the record from the Federal Energy Regulatory Commission and was briefed and argued by counsel for the parties. The court has reviewed the issues presented and finds they occasion no need for a published opinion. *See* D.C. Cir. R. 14(c). For the reasons set forth in the accompanying memorandum, it is

ORDERED and ADJUDGED by the court that the petition for review be denied.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 15. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam.

For the Court:

Constance L. Dupré,
Clerk

MEMORANDUM

Consolidated Gas Company again petitions for review of two Federal Energy Regulatory Commission orders declaring that the Florida Gas Transmission Company ("FGT") is not obliged to finance a lateral line connecting the two companies' distribution systems. In March 1986, we vacated two prior orders insofar as they related to this same issue and reminded the Commission of its "obligation to engage in reasoned decision making by providing an explanation for accepting" one of two possible interpretations of the applicable FGT tariff. *Consolidated Gas Co. v. FERC*, No. 85-1040 at 4 (D.C. Cir. Mar. 4, 1986) ("Memorandum Opinion"). FERC subsequently issued a new order reaffirming its original position, *Consolidated Gas Co. of Florida v. Florida Gas Transmission Co.*, Opinion No. 225-B (1987), as well as one denying Consolidated's application for rehearing, Opinion No. 225-C (1988).

We recapitulate the essential facts: In its Opinion No. 225, issued September 19, 1984, the Commission ordered FGT to supply Consolidated with natural gas but held that the applicable FGT tariff ("Tariff II") required that Consolidated pay the cost of the lateral line even though the tariff was silent on the obligation of new customers to assume such costs. The Commission reasoned that as the tariff explicitly required existing customers to absorb the cost of new laterals, they would be subject to undue discrimination if new customers were not required to do the same. *Consolidated Gas Co. v. Florida Gas*

Transmission Co., 28 F.E.R.C. ¶ 61,350 (1984). FERC denied Consolidated's application for rehearing of this latter holding in its Opinion No. 225-A, *Consolidated Gas v. Florida Gas Transmission Co.*, 29 F.E.R.C. ¶ 61,205 (1984).

When we considered Consolidated's petition for review of those orders, we recognized that the case involved two conflicting claims of undue discrimination in violation of section 4 (b) of the Natural Gas Act. 15 U.S.C. § 717c(b) (1982). The first was FGT's claim that Tariff II would unduly discriminate between new and existing customers if Consolidated's position were to prevail; the second, Consolidated's claim that undue discrimination would result if the Commission's and FGT's position were accepted because, under the previous tariff ("Tariff I"), FGT had financed the construction of lateral lines to most new customers, including Consolidated's competitors. We stated that

> [t]he fatal flaw in the Commission's decision is that in an effort to avoid one type of discrimination, they have apparently allowed a separate type. Consolidated points out that nearly all of Florida Gas' existing customers had their initial lateral lines paid for by FGT when they were new customers. To change this policy now, the argument goes, and require a new customer to pay for its initial line, would discriminate against Consolidated. FERC simply does not explain why these facts do not implicate the Commission's antidiscrimination policy.

Memorandum Opinion at 2-3. Accordingly, we vacated Part IV and Order "D" of Opinion No. 225 (the sections dealing with lateral line issue) and all of Opinion No. 225-A, and remanded to FERC.

In the two orders now challenged, Opinion No. 225-B (Order on Remand issued Mar. 30, 1987) and Opinion No. 225-C (Order Denying Rehearing issued Mar. 2, 1988), the Commission reaffirmed its earlier conclusion that FGT had properly interpreted Tariff II to require new customers to pay the cost of lateral lines. The Commission justified this conclusion in two ways: First, it stated that principles of statutory construction so required:

> Interpreting Tariff II so as to require existing customers to pay for their sales lateral construction while not requiring new customers (like Consolidated) to pay for their sales lateral construction, would confer a preference or cost advantage to new customers. Such disparate treatment would violate section 4 (b) of the NGA unless there is a reasonable basis for the disparity or there are facts which justify such disparity. . . . It is well settled that contracts or other written instruments should be interpreted to avoid a possible violation of law. For this reason, and because, in our view, a contrary interpretation would be unduly discriminatory, we construe the tariff provision in question as requiring Consolidated to pay for the construction of a new sales lateral.

Opinion No. 225-B at 4-5, J.A. 153-54.

Second, FERC asserted that its interpretation did not result in undue discrimination against Consolidated because, as a result of fundamental changes that had occurred in FGT's gas distribution business, it was not appropriate to compare the treatment of new customers under the two tariffs. According to FERC,

> in the 1960's FGT contributed to the cost of initial laterals for service to new communities when it eagerly sought to obtain new customers and market plentiful supplies of gas. During the 1970's, when Tariff I was in effect, interstate pipelines (like FGT) were faced with gas shortages and, as a result, began curtailing system supplies to their customers. Toward the end of the 1970's and in the early 1980's, the curtailments eased and the interstate gas market transformed into a surplus deliverability gas market. Given these fundamental changes, it is not surprising that FGT decided to revise its contribution policy in 1982.

Id. at 6, J.A. 155. FERC concluded that these changed circumstances rendered FGT's change in policy both "reasonable and within its legitimate managerial prerogative." *Id.*

The Commission's first explanation is unacceptable. In essence, it asserts that an interpretation of Tariff II that would treat new and existing customers differently is presumptively discriminatory. This position contradicts, without explanation, the one set forth in the Commission's **Statement of Lateral Line Policy in Rate Schedules Filed by Natural Gas Pipeline Companies,** which asserts that "[t]here is nothing inherently objectionable in a policy statement which creates separate sets of criteria with respect to new and existing purchasers. . . ." 40 F.P.C. 46, 48 (1968).

Nevertheless, thanks in large part to the more ample discussion contained in the FERC and Intervenor briefs, we are able to discern, in the Commission's second rationale, an acceptable basis for its decision: When a natural gas transmission pipeline is engaged in a major expansion, it will provide inducements in order to tie new markets into its system; at the same time, its ability to spread the cost of a major expansion over a larger base of customers will enable it to achieve savings in the unit price of the gas it sells. When a pipeline is operating at capacity, however, the addition of a new customer will not accrue to the benefit of the system as a whole, and pipeline management may properly expect a new consumer to absorb the full cost of the service it seeks.

We agree with the Commission that it is not here relevant that FGT has filed an application for a waiver of its present lateral payment policy (the one existing under the successor tariff to Tariff II), which explicitly requires new as well as existing customers to finance laterals, because that application contemplates a new period of expansion. We note, however, that should the application be granted, there is nothing to prevent Consolidated from seeking FGT payment for its lateral at that time.

Although the meagerness of FERC's explanation tempts us to remand the case yet again, considerations of judicial economy counsel against our doing so. Accordingly, for the reasons herein stated, the petition for review is

Denied.

42 FERC ¶ 61,271 (1988)

Consolidated Gas Company of Florida, Inc. v. Florida Gas Transmission Company, Docket No. CP82-342-004

Opinion No. 225-C; Order Denying Rehearing

(Issued March 2, 1988)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C.M. Naeve.

[Note: Opinion No. 225-B on remand issued March 30, 1987, appears at 38 FERC ¶ 61,317]

[Opinion No. 225-C Text]

Consolidated Gas Company of Florida, Inc. (Consolidated) has filed an application for rehearing of Opinion No. 225-B.[1] In Opinion No. 225-B, the Commission, after further consideration in response to a remand[2] from the U.S. Court of Appeals for the D.C. Circuit, reaffirmed its previous holding that Florida Gas Transmission Company's (FGT) tariff should be interpreted to require Consolidated, a new resale customer of FGT, to pay for the construction of a sales lateral connecting FGT's system to Consolidated's system, even though that tariff was silent as to the payment obligations of new resale customers for sales laterals constructed on their behalf. As discussed below, we will deny the request for rehearing.

Background

Section 154.39(b) of the Regulations requires, among other things, a pipeline to articulate in its tariff the company's policy on whether it will pay or not pay for all or any part of the cost of constructing laterals for new and existing customers. FGT did not fully comply with section 154.39(b). While Section 14 of the applicable tariff (Tariff II)[3] required existing customers to make a contribution equal to the full cost of the sales lateral constructed on their behalf, it was silent as to who would bear the cost of lateral construction for new customers.

Throughout these proceedings, Consolidated has maintained that the tariff's silence should be interpreted as requiring FGT to pay the lateral construction for new customers. In Opinion No. 225-B, we rejected this argument:

> Interpreting Tariff II so as to require existing customers to pay for their sales lateral construction, while not requiring new customers (like Consolidated) to pay for their sales lateral construction, would confer a preference or cost advantage to new customers. Such disparate treatment would violate section 4(b) of the NGA unless there is a reasonable basis for the disparity or there are facts which justify such disparity. (Footnote omitted.) Our review of the record does not reveal any facts (i.e., differences in the economics of sales lateral construction, quality of service, ultimate use of the sales lateral or the gas transported therein) which would justify the disparate treatment.[4]

Consolidated has also maintained that, because FGT's existing customers had their initial lateral lines paid for by FGT many years ago, it would be unduly discriminatory to require Consolidated to bear the cost of Consolidated's initial lateral line. We observed that:

> [t]o the extent FGT paid for any of the existing customer's laterals, such payments were made pursuant to tariffs and lateral line policies legally effective prior to Tariff II. (Footnote omitted.)
>
> * * *
>
> More important, in the 1960's FGT contributed to the cost of initial laterals for service to new communities when it eagerly sought to obtain new customers and market plentiful supplies of gas. During the 1970's, when Tariff I was in effect, interstate pipelines (like FGT) were faced with gas shortages and, as a result, began curtailing system supplies to their customers. (Footnote omitted.) Toward the end of the 1970's and in the early 1980's, the curtailment eased and the interstate gas market transformed into a surplus deliverability gas market. Given these fundamental changes, it is not surprising that FGT decided to revise its contribution policy in 1982. FGT's departure from its previous practice of paying all or a portion of the initial lateral construction costs for all customers (whether new or existing) to a policy of not bearing any initial or supplemental lateral construction costs is reasonable and

within its legitimate managerial prerogative. Our Regulations do not require a pipeline, which once paid all or a portion of the initial lateral construction costs, to do so forever. Indeed, Order No. 365 (at 47-48) makes clear that a pipeline company is free to choose its own non-discriminatory contribution policy, even if the policy departs from a past practice or policy, as long as all customers are treated fairly under the policy in effect at a particular time. In this case, FGT has indicated that changes in the gas market led to changes in its policy concerning who would pay the construction costs for new laterals. These changes were reflected in tariff provisions that were filed and approved in accordance with the Commission's Regulations. All customers, whether new or existing, are treated even-handedly under the tariff as we have interpreted it and, for the reasons we have stated, we find that the application of the tariff does not result in undue discrimination against Consolidated.[5]

Request for Rehearing

On rehearing, Consolidated initially argues that the Commission's interpretation of Section 14 of Tariff II is *ultra vires* and is contrary to the regulations because it retroactively creates a non-existing obligation (i.e., requiring a new customer to pay for its lateral line construction) on the pretense of preventing an undue discrimination against the existing customers, who, under Tariff II, were explicitly required to pay for their lateral construction. Consolidated contends that an undue discrimination finding does not lie where, as in this case, there is no proof that a competitor of Consolidated has been injured. Moreover, states Consolidated, all terms and conditions under which service is to be provided must be stated in the tariff. According to Consolidated, a tariff is presumed to be lawful unless the party challenging it demonstrates its unlawfulness. Consolidated contends that, since the filing of Tariff II, the Commission under the retroactive ratemaking[6] and filed rate[7] doctrines cannot retroactively rewrite the tariff, which is either valid or invalid under its own terms and can only be changed prospectively.

Secondly, Consolidated contends that the undue discrimination analysis in Opinion No. 225-B is without foundation since it overlooks the significance of FGT's recent expansion application filed on September 16, 1986 in Docket No. CP86-704-000,[8] where FGT seeks waiver of its Tariff III lateral payment policy (*see* note 3 *supra*) that would (with the waiver) require inclusion of all lateral expansion and construction costs (i.e, for both new and existing customers) in its cost of service.[9] Specifically, Consolidated contends that it is not unduly discriminatory to require FGT to adhere to its tariff and construct the small consolidated lateral when FGT (in Docket No. CP86-704-000) proposes to waive the tariff requirement for existing customers so that it may construct and upgrade the laterals for service to the existing customers at its own expense.

Finally, Consolidated contends that it has been nearly five years since it has filed its NGA section 7(a) application and that, because of the Commission's delay in rendering a final decision in these proceedings, the public interest and Consolidated have been harmed.

Discussion

We will not interpret Tariff II's silence on the lateral line payment obligations of new customers in such a manner as to require FGT to pay for the lateral construction cost of the new customers. Such an interpretation would clearly confer an undue preference[10] on the new customers over the existing customers, because existing customers would have to pay for laterals while new customers would not. We need not inquire into potential damages to Consolidated's competitors because the discrimination would be patent on its face.

We reject the argument that the Commission, in its interpretation of section 14 of Tariff II, creates an otherwise nonexistent obligation to require new customers to pay their own lateral construction costs, or that the Commission has retroactively rewritten the terms of Tariff II in contravention of the retroactive ratemaking doctrine or the filed rate doctrine. The Commission has not changed, added to, or rewritten the tariff. Rather, it has construed the silence in Tariff II to give it full meaning, and to do so in such a manner so as to avoid rendering the tariff unduly discriminatory (and hence, unlawful) on its face.

We also fail to perceive any significance in the apparent inconsistency between FGT's proposal in Docket No. CP86-704-000 to upgrade and construct laterals for all customers at its own expense and its decision to not pay for Consolidated's lateral in the instant proceeding. There is nothing in the regulations or case law (absent proof of undue discrimination) which prevents a pipeline from changing its lateral payment policy, even if the new policy appears to be inconsistent with a past policy. In this regard, FGT's request for a waiver to upgrade and construct laterals was properly made under Tariff III and section 154.39(b)(ii) of the regulations, which expressly permits a pipeline to reserve its right to seek waiver of the lateral policy under the tariff.

The Commission orders:

The request for rehearing filed by Consolidated in the instant proceeding is denied.

Footnotes

[1] *Consolidated Gas Company of Florida, Inc. v. Florida Gas Transmission Company*, 38 FERC ¶ 61,317 (1987).

[2] *Consolidated Gas Company of Florida, Inc. v. FERC*, No. 85-1040 (D.C. Cir. March 4, 1986).

[3] Section 14 of FGT's tariff has been revised three times since 1970. At the time of the May 21, 1982 filing of Consolidated's application pursuant to section 7(a) of the Natural Gas Act (NGA), FGT's then effective tariff (Tariff I) required existing customers to bear the full cost of construction of additional delivery points added to increase the deliverability to the existing customers. The resale customers (both new and existing) who provided initial service to a new community were required to pay the sales lateral costs not covered by FGT's maximum investment, as determined by a formula. FGT revised its contribution policy by filing new tariff sheets (Tariff II) which became effective on June 7, 1982. Unlike Tariff I, Tariff II does not contain a formula to determine the level of sales lateral payments to be made by FGT or the resale customers (new and existing). Tariff III (effective June 25, 1984) explicitly requires both new and existing customers to pay the full cost of the laterals constructed on their behalf. (Section 14 of Tariffs I, II and III are reproduced in appendices A, B and C of Opinion No. 225-B.)

[4] Opinion No. 225-B, at p. 62,029.

[5] *Id.* at p. 62,030.

[6] The doctrine against retroactive ratemaking refers to a list of "cases under both the Federal Power Act . . . and Natural Gas Act [which] establish[ed] the principle that only prospective ratemaking is allowed. A rate designed to recoup past losses is retroactive and illegal." *Public Service Company of New Hampshire v. FERC*, 600 F.2d 944, 958 (D.C. Cir. 1979).

[7] The filed rate doctrine in essence "forbids a regulated entity to charge *rates* for its service other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571, 577 (1981).

[8] By order issued on January 16, 1987 (38 FERC ¶ 61,018), the Commission consolidated Docket No. CP86-704-000 with another expansion proceeding and established hearing procedures.

[9] When the expansion and construction costs are rolled into the cost of service, all FGT customers (new and existing) pay for these costs irrespective of whether they receive service from the constructed or expanded facilities. This differs from the Tariff III lateral policy in which both new and existing customers are required to pay for the laterals which are constructed or expanded for their individual service requirements.

[10] As we pointed out in Opinion No. 225-B (at p. 62,029), there is no record evidence or facts presented by any party to justify such a preference.

38 FERC ¶ 61,317 (1987)

Consolidated Gas Company of Florida v. Florida Gas Transmission Company, Docket No. CP82-342-003

Opinion No. 225-B; Order on Remand

(Issued March 30, 1987)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C.M. Naeve

[Note: Opinion No. 225-A, issued November 19, 1984, appears at 29 FERC ¶ 61,205.]

[Opinion No. 225-B Text]

We have before us, on remand from the U.S. Court of Appeals for the D.C. Circuit,[1] the issue of whether Consolidated Gas Company of Florida, Inc. (Consolidated), a new resale customer of Florida Gas Transmission Company (FGT), should be required to pay for the construction of a sales lateral which would connect FGT's system to Consolidated's system. In Opinion Nos. 225[2] and 225-A,[3] the Commission directed Consolidated to bear the cost of the sales lateral construction. On March 4, 1986, the D.C. Circuit vacated and remanded the decision for reconsideration, ruling that the Commission did not fully explain the reasons for its conclusion.[4] Upon reconsideration of Opinion Nos. 225 and 225-A, we will affirm the result reached in those orders, but for reasons in addition to those propounded therein.

Background

Section 154.39(b)[5] of the Regulations requires a pipeline to articulate in its tariff the company policy on financing and construction of sales laterals (i.e., facilities other than mainline facilities which are necessary to interconnect the pipeline system with a customer's system) for both new, and existing customers. Specifically, subsection (b)(1)(i) provides that "[i]f it is the company's policy to build or contribute to the construction of any sales laterals to resale customers," the company is required to make a statement which sets forth the terms and

any formula used to determine the amount of the company's contribution. Subsection (b)(2) provides that "[i]f it is the company's policy not to build or contribute to the construction of any sales laterals to resale customers," the company is required to make a tariff statement reflecting that fact.

Section 14 of FGT's tariff has been revised three times since 1970. At the time of the May 21, 1982 filing of Consolidated's section 7(a) application, FGT's then effective tariff (Tariff I) required existing customers to bear the full cost of construction of additional delivery points added to increase the deliverability to the existing costumers. The resale customers (both new and existing) who provided initial service to a new community were required to pay the sales lateral costs not covered by FGT's maximum investment, as determined by a formula. (*See* Appendix A.) FGT revised its contribution policy by filing new tariff sheets (Tariff II) which became effective on June 7, 1982. (*See* Appendix B.) Unlike Tariff I, Tariff II does not contain a formula to determine the level of sales lateral payments to be made by FGT or the resale customers (new and existing). Tariff III (effective June 25, 1984) explicitly requires both new and existing customers to pay the full cost of the laterals constructed on their behalf. (*See* Appendix C.)

Section 14 of Tariff II, the tariff applicable in this case, provides that *existing* customers (as opposed to FGT) are required to pay for the sales laterals constructed on their behalf. However, it is silent as to whether FGT or *new* customers would have to bear the costs of the sales laterals constructed for service to new customers. FGT argues that it intended, under Tariff II, to require all customers (including new customers) to pay for their sales lateral construction.

In the initial decision issued on November 21, 1983,[6] the presiding judge granted Consolidated's request to direct an unwilling FGT to construct a lateral extending to Consolidated's facilities and to sell and deliver gas to Consolidated. The initial decision also held that, because FGT's tariff only required lateral construction contributions from existing customers, and was silent about the contribution obligations of the new customers, Consolidated (a new customer) was not required to pay for the proposed sales lateral construction.

In Opinion No. 225 (at p. 61,638), the Commission affirmed the initial decision to the extent that it directed FGT to construct the sales lateral[7] and to sell and deliver gas to Consolidated, but reversed that part of the decision which construed section 14 of FGT's tariff as requiring FGT to pay for the lateral line construction. We observed:

> It is undisputed that section 14 of FGT's tariff requires existing customers to pay that cost in full as an aid-to-construction. We agree with the law judge that the section is silent with respect to new customers. We do not agree, however, that this means that FGT must bear the cost. True, a pipeline company may have separate sets of criteria with respect to new and existing customers, but only "as long as the difference does not embody undue discrimination against either group." (footnote omitted) Assuming that the silence of FGT's tariff amounts to an announced policy of noncontribution by new customers, we find that FGT's separate unexplained policies for new and existing customers is unduly discriminatory against existing customers. Hence, Consolidated must pay a full aid-to-construction.

In Opinion No. 225-A (at p. 61,416), the Commission further stated:

> a tariff policy that treats new and existing customers differently is unduly discriminatory unless the discrimination is justified. Here, no defense of the discriminatory policy has been offered, and none is readily apparent to us. Hence, we do not approve that policy.

The D.C. Circuit Remand

On Appeal, the D.C. Circuit found that the portions of Opinion Nos. 225 and 225-A (relevant to the issue of who bears the cost of lateral line construction) were not based on reasoned decision-making. The court indicated that those orders did not adequately articulate why it would be unduly discriminatory to require FGT to pay for the lateral construction requested by a new resale customer but not for such construction requested by existing resale customers. In particular, the court said that the

Commission did not address Consolidated's undue discrimination claim that, because FGT's existing customers had *their initial* lateral lines paid for by FGT, it would be unduly discriminatory to not require Consolidated to pay for *its initial* lateral line. In essence, stated the court, the Commission orders, in an effort to eradicate one type of undue discrimination, may have overlooked a different type of undue discrimination. Finally, although FGT and the Commission explained in their appellate briefs that FGT paid all or a portion of the construction costs of the existing customers' initial laterals many years ago when the gas market was radically different and FGT was eager to obtain new customers and increase sales, the explanations, the court stated, were not reflected in the orders and thus could not serve as the basis of the Commission's decision.

Discussion

We have reconsidered our orders in light of the court's remand and believe that our conclusion was correct, though for reasons in addition to those propounded therein.

Interpreting Tariff II so as to require existing customers to pay for their sales lateral construction, while not requiring new customers (like Consolidated) to pay for their sales lateral construction, would confer a preference or cost advantage to new customers. Such disparate treatment would violate section 4(b) of the NGA unless there is a reasonable basis for the disparity or there are facts which justify such disparity.[8] Our review of the record does not reveal any facts (i.e., differences in the economics of sales lateral construction, quality of service, ultimate use of the sales lateral or the gas transported therein) which would justify the disparate treatment. It is well settled that contracts or other written instruments should be interpreted to avoid a possible violation of law.[9] For this reason, and because, in our view, a contrary interpretation would be unduly discriminatory, we construe the tariff provision in question as requiring Consolidated to pay for the construction of a new sales lateral.

Nor are we persuaded by Consolidated's claim that it would be unduly undiscriminatory for FGT not to pay for Consolidated's initial lateral line when FGT many years ago paid for all or a portion of the initial laterals constructed on behalf of the existing customers. To the extent FGT paid for any of the existing customers' initial laterals, such payments were made pursuant to tariffs and lateral line policies legally effective *prior* to Tariff II.[10]

More important, in the 1960's FGT contributed to the cost of initial laterals for service to new communities when it eagerly sought to obtain new customers and market plentiful supplies of gas. During the 1970's, when Tariff I was in effect, interstate pipelines (like FGT) were faced with gas shortages and, as a result, began curtailing system supplies to their customers.[11] Toward the end of the 1970's and in the early 1980's, the curtailments eased and the interstate gas market transformed into a surplus deliverability gas market. Given these fundamental changes, it is not surprising that FGT decided to revise its contribution policy in 1982. FGT's departure from its previous practice of paying all or a portion of the initial lateral construction costs for all customers (whether new or existing) to a policy of not bearing any initial or supplemental lateral construction costs is reasonable and within its legitimate managerial prerogative. Our Regulations do not require a pipeline, which once paid all or a portion of the initial lateral construction costs, to do so forever. Indeed, Order No. 365 (at 47–48) makes clear that a pipeline company is free to choose its own *nondiscriminatory* contribution policy, even if that policy departs from a past practice or policy, as long as all customers are treated fairly under the policy in effect at a particular time. In this case, FGT has indicated that changes in the gas market led to changes in its policy concerning who would pay the construction costs for new laterals. These changes were reflected in tariff provisions that were filed and approved in accordance with the Commission's Regulations. All customers, whether new or existing, are treated even handedly under the tariff as we have interpreted it and, for the reasons we have stated, we find that the application of the tariff does not result in undue discrimination against Consolidated.

The Commission orders:

Consolidated shall reimburse FGT the cost of construction of the sales lateral.

Footnotes

[1] *Consolidated Gas Company of Florida, Inc. v. F.E.R.C.*, No. 85-1040 (D.C. Cir. March 4, 1986).

[2] *Consolidated Gas Company of Florida, Inc. v. Florida Gas Transmission Company*, 28 FERC ¶ 61,350 (1984).

[3] *Consolidated Gas Company of Florida, Inc. v. Florida Gas Transmission Company*, 29 FERC ¶ 61,205 (1984).

[4] Slip op. at 4.

[5] Section 154.39(b) was promulgated in its present form by Order No. 365, 40 FPC 46 (1968), *reh'g denied*, 40 FPC 275 (1968).

[6] *Consolidated Gas Company of Florida, Inc. v. Florida Gas Transmission Company*, 25 FERC ¶ 63,039 (1983).

[7] As of the date of this order, the lateral line has not been constructed.

[8] *See* 15 U.S.C. § 717c(b), which provides that:

(b) No natural gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant *any undue preference* or *advantage* to any person or subject any person to any *undue prejudice* or *disadvantage*, or (2) maintain any unreasonable difference in rates, charges, *service, facilities*, or in any other between localities or *as between classes of service*. (Emphasis added.) Section 4(b) of the NGA does not forbid discrimination (i.e., disparate treatment) *per se*. Rather, it prohibits only *undue* discrimination, which is defined as a "preference without a reasonable basis." *Sebring Utility Commission v. F.E.R.C.*, 591 F.2d 1003, 1010 n.28 (1979). *Compare, St. Michaels Utilities Commission v. F.P.C.*, 377 F.2d 912, 915 (4th Cir. 1967), where the court stated discrimination is justified if it is predicated on differences in fact (i.e., costs or other conditions of service). *Compare also*, Order No. 365 (at 47), where the Commission stated "a pipeline company may chose to offer different construction contributions to different customers or classes of customers, but the differences must be based on objective and reasonable criteria."

[9] *See, e.g., National Van Lines v. U.S.*, 355 F.2d 326, 322 (7th Cir. 1966).

[10] *See, e.g.*, page 2 of the text of the instant order for a discussion of the differences between Tariff I and Tariff II. We note that, even under the Tariff I formula, at least two existing customers made a contribution in aid of their initial lateral constructions (tr. 279-80, Exh. No. 6). Moreover, according to the unrebutted testimony of an FGT witness, under Tariff I Consolidated would have been required to make a contribution in aid of the construction of its initial lateral line. (Tr. 290-291).

[11] *See, e.g., Sebring Utilities Commission v. F.E.R.C.*, 591 F.2d 1003, 1007 (D.C. Cir. 1979); and Order No. 436, *FERC Statues and Regulations, Regulations Preambles 1982-1985* ¶ 30,665, 31,485 (1985), *modified, FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,675 (1985) (Order No. 436-A), *pet. for review filed sub. nom., Associated Gas Distribution v. F.E.R.C.*, No. 85-1811 (D.C. Cir. filed Dec. 12, 1985).

Appendix A

Section 14 of Tariff I provides in pertinent part:

Florida Gas Transmission Company

F.P.C. Gas Tariff, Original Volume No. 1

First Revised Sheet No. 22A

Superseding Original Sheet No. 22A

General Terms and Conditions (Continued)

The maximum amount of investment that Seller will make in constructing sales lateral pipelines to a resale customer to provide natural gas service in a community to which service has not been heretofore authorized will be determined by the following formula:

(i) Third year revenues to Seller under Seller's Rate Schedules G and I for sales to such new distribution system shall be estimated,

(ii) There will be deducted from the revenues determined in (i) above the aggregate of (a) the sum of an amount determined by multiplying the estimated third year volume of sales in therms under Seller's Rate Schedules G and I to such distribution system by the unit price per therm received by Seller for sales of gas to Primary Interruptible consumers, averaged over the preceding calendar year, and (b) the estimated operation and maintenance expenses for such lateral pipeline and measuring and regulating facilities,

(iii) The result obtained in (ii) above will be multiplied by 10.7 and there will be deducted from such product an amount determined by multiplying the total overall capital cost of the lateral and the measuring and regulating facilities by 0.36, to obtain the maximum amount of investment Seller will make in such sales lateral pipeline including the measuring and regulating facilities;

Provided that: (1) the estimated third year market requirements used in computing such investment are acceptable to Seller; (2) the length of the lateral to be constructed

by Seller resulting from the calculated investment shall be based upon Seller's estimated costs, including the use of minimum nominal 4-inch diameter pipe; (3) Seller's measuring and regulating facilities shall be installed at a point which will not result in increasing the contribution by the customer and which in Seller's sole judgment, is a practical, convenient and readily accessible location; and (4) Seller has sufficient capacity in its existing facilities to render the service proposed. In the event the estimated total overall capital cost of the sales lateral pipeline is greater than the amount Seller will invest, as determined by the foregoing formula, then (a) Seller will construct, own and operate the proposed sales lateral pipeline provided an aid-to-construction contribution is made to Seller by Buyer in an amount equal to the excess of the total capital cost over the determined investment, or (b) the length of the lateral line may be reduced and the metering and regulating facilities relocated to the extent that the cost of the reduced sales lateral pipeline constructed by Seller would be equal to the investment Seller will make as determined by the foregoing formula; (c) the foregoing shall not preclude the Buyer if it so desires from constructing at its own expense a lateral pipeline of such length to result in Seller's investment being less than would result under this formula.

In the case of an existing resale, customer already being served, Seller will construct, own and operate sales lateral pipelines, including metering and regulating facilities, to establish additional points of delivery to such customer to improve the deliverability of the customer's existing resale distribution system; provided (1) the metering and regulating facilities shall be installed at a point which, in Seller's sole judgment, is the most practical, convenient and readily accessible location; (2) the lateral pipeline shall be installed by use of not less than a nominal 4-inch diameter pipe; (3) the customer contributes an aid-to-construction amount to Seller which is equal to the cost of the additional facilities; and (4) the new delivery point shall connect with and serve only a distribution system operated in a local community presently served by such customer.

Nothing in this policy statement shall require Seller to file an application for a certificate of public convenience and necessity under section 7(c) of the Natural Gas Act. Nothing in this policy statement, further, shall prevent Seller from contesting an application for service filed pursuant to section 7(a). Seller reserves the right to seek a waiver of the policy set forth herein, for good cause shown, during any proceeding before the Commission instituted under section 7 of the Natural Gas Act.

Issued by: W. J. Bowen. President

Issued on: November 1, 1971

Effective: December 4, 1971

Issued to comply with order of the Federal Power Commission, Docket Nos. CP69-181, et al., dated September 29, 1971 op 605

Appendix B

Section 14 of Tariff II provides in pertinent part:

Florida Gas Transmission Company

F.E.R.C. Gas Tariff, Original Volume No. 1

Second Revised Sheet No. 22-A

Superseding First Revised Sheet No. 22A

If Seller is otherwise agreeable to providing the requested service, it will do so on the following terms:

a. In the case of an existing resale customer already being served, Seller will construct, own and operate sales lateral pipelines, including metering and regulating facilities, to establish additional points of delivery to such customer to improve the deliverability of the customer's existing resale distribution system provided: (1) the metering and regulating facilities shall be installed at a point which, in Seller's sole judgment, is the most practical, convenient and readily accessible location; (2) the lateral pipeline shall be installed by use of not less than a nominal four-inch (4") diameter pipe; (3) the customer provides all exhibits necessary to support the proposed service for any needed FERC proceedings, and; (4) the customer contributes an

aid-to-construction amount to Seller which is equal to the cost of the additional facilities including all costs involved in obtaining all licenses and permits required for the services.

b. In the case of existing resale customers requesting a new delivery point which will not be connected to its existing distribution system, if, in addition to the terms set out in (a) above, the requesting customer is able to demonstrate to Seller's satisfaction that the new requirements will be classified in Priorities 1 through 4 in Seller's presently effective end-use curtailment plan and that the new service can be accomplished within the customer's existing volumetric entitlement as determined under Section 9.4b hereof.

Nothing in this policy statement shall require Seller to file an application for a certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act. Further, nothing in the policy statement shall prevent Seller from contesting an application for service filed pursuant to Section 7(a). Seller reserves the right to seek a waiver of the policy set forth herein, for good cause shown, during any proceeding before the Commission instituted under Section 7 of the Natural Gas Act.

Notice is hereby given that, effective ____, tariff sheet number 22-B shall be cancelled.

Issued by: W. J. Smith, President

Issued on: April ____, 1982

Effective: 6-7-82

Appendix C

Section 14 of Tariff III provides in pertinent part:

Florida Gas Transmission Company

FERC Gas Tariff

First Revised Volume No. 1

Original Sheet No. 40

General Terms and Conditions (Continued)

a. Seller will construct, own and operate sales lateral pipelines, including metering and regulating facilities, to establish new and/or additional points of delivery to such customer

provided: (l) the metering and regulating facilities shall be installed at a point which, in Seller's sole judgment, is the most practical, convenient and readily accessible location; (2) the lateral pipeline shall be installed by use of not less than a nominal four-inch (4") diameter pipe; (3) the customer provides all exhibits necessary to support the proposed service for any needed FERC proceedings and; (4) the customer contributes an aid-to-construction amount to Seller which is equal to the cost of the additional facilities including all costs involved in obtaining all licenses and permits required for the services.

b. In cases where existing resale customers have requested a new delivery point which will not be connected to its existing distribution system, if, in addition to the terms set out in (a) above, the requesting customer is able to demonstrate to Seller's satisfaction that the new requirements will be classified in Priorities 1 through 4 in Seller's presently effective end-use curtailment plan.

Resale customers, whether new or existing, shall bear all costs and expenses attributable to the construction of any sales lateral pipelines or expansions of existing sales lateral pipelines. Nothing in this policy statement shall require Seller to file an application for a certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act. Further, nothing in the policy statement shall prevent Seller from contesting an application for service filed pursuant to Section 7(a). Seller reserves the right to seek a waiver of the policy set forth herein, for good cause shown, during any proceeding before the Commission instituted under Section 7 of the Natural Gas Act.

Issued by: W. J. Smith, President

Issued on: May 25, 1984

Effective: June 25, 1984

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1040

SEPTEMBER TERM, 1985

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION

Before Mikva and Bork, *Circuit Judges*, and OBERDORFER,* *District Judge*.

JUDGMENT

This case was heard on the record on appeal from the Federal Energy Regulatory Commission, and was argued by counsel for both parties. While the issues presented occasion no need for an opinion, they have been fully considered by the Court. *See* Local Rule 13(c). On consideration of the issues, and for the reasons set forth in the accompanying memorandum, it is

ORDERED and ADJUDGED by this court that the decision of the Federal Energy Regulatory Commission, as reflected in Part IV of Order 225 (and any related statements) and in all of Order 225-A, is vacated, and that the case is remanded for further consideration. It is

FURTHER ORDERED, *sua sponte,* that the Clerk shall withhold issuance of the mandate until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981, and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for an expedited issuance of the mandate for good cause shown.

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

Per Curiam.

For the Court:

George A. Fisher,
Clerk

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*The Honorable Louis F. Oberdorfer, of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1982).

MEMORANDUM

No. 85-1040: **Consolidated Gas Co. v. Federal Energy Regulatory Commission**

Since May 1982, Consolidated Gas has been asking the Federal Energy Regulatory Commission to order Florida Gas Transmission Co. ("FGT") to construct and pay for a lateral line to connect the two companies' distribution systems. FERC has refused, ruling that under the terms of the FGT tariff, such an order would unfairly discriminate against existing FGT customers. Without passing judgment on the wisdom of this result, we find that the Commission has failed to explain the reasons for its conclusion. We therefore vacate those parts of FERC Orders 225 and 225-A that are in it consistent with this memorandum, and remand for reconsideration.

The background of this case can be quickly summarized. Consolidated filed an application with the Commission pursuant to section 7(a) of the Natural Gas Act, 15 U.S.C. § 717f(a) (1982), asking that FGT be instructed to sell and deliver gas to Consolidated. An Administrative Law Judge determined that Florida Gas must sell to petitioner, and that it also must finance

the cost of the connecting lateral line. FERC affirmed this recommendation in part and reversed in part in Opinion No. 225. *Consolidated Gas v. Florida Gas Transmission Co.*, 28 F.E.R.C. ¶ 61,350 (1984). The Commission agreed that Florida Gas must sell and deliver the gas; after examining the FGT tariff, however, FERC concluded that Consolidated should bear the construction expense. This decision was affirmed in Opinion No. 225-A, which denied Consolidated's request for a rehearing. *Consolidated Gas v. Florida Gas Transmission Co.*, 29 F.E.R.C. ¶ 61,205 (1984).

At the heart of this dispute is the Florida Gas tariff sheet. Despite FERC regulations to the contrary, *see* 18 C.F.R. § 154.39(b) (1985), the FGT tariff is silent as to whether new customers must pay for lateral line construction. The tariff only states that **existing** customers must pay for any additional lines that they request. The Commission was thus required to fill in a gap left by the tariff drafters.

In its opinions, FERC correctly recognized that in some circumstances it is acceptable for a pipeline to treat new customers differently than it does existing ones. The Commission said that in this case, however, it would be unduly discriminatory for FGT to pay for its new customers' lines, but not for those requested by existing customers, at least without an adequate explanation for the distinction. "Here," FERC said, "no defense of the discriminatory policy has been offered, and none is readily apparent to us." 29 F.E.R.C. at 61,416.

There is no question that FERC has a duty to ensure that pipelines do not unfairly discriminate among customers. 15 U.S.C. § 717c(b) (1982) (§ 4(b) of the Natural Gas Act). The fatal flaw in the Commission's decision is that in an effort to avoid one type of discrimination, they have apparently allowed a separate type. Consolidated points out that nearly all of Florida Gas's existing customers had their initial lateral lines paid for by FGT when they were new customers. To change this policy now, the argument goes, and require a new customer to pay for its initial line, would discriminate against Consolidated. FERC simply does not explain why these facts do not implicate the Commission's anti-discrimination policy.

In its briefs and at oral argument, the Commission and Florida Gas presented several arguments to explain why FERC's

decision does not discriminate against Consolidated. They said that when the existing customers had their initial lines built in the 1960s, the gas market was radically different. Twenty years ago Florida Gas was eager to obtain new customers, and was willing to pay construction costs to promote sales. Today, however, it claims that it is no longer seeking new customers, making it reasonable to change policies.

All this may be true, but it is not what FERC said in its opinions. The Commission has an obligation to "articulate the critical facts upon which it relies," and to explain its reasoning fully. *Columbia Gas Transmission Corp. v. Federal Energy Regulatory Commission*, 628 F.2d 578, 593 (D.C. Cir. 1979). Here the only mention of Consolidated's argument is in a footnote:

> Consolidated seems to argue that because FGT once built laterals at its own expense, it must do so forever. We can't accept this.

29 F.E.R.C. at 61,416 n.5. Beyond that, the Commission says that it was not even presented with any arguments that would justify ordering FGT to pay. This failure to consider all the evidence and arguments before it makes FERC's ultimate decision arbitrary and capricious. *See Appalachian Power Co. v. Environmental Protection Agency*, 477 F. 2d 495, 507 (4th Cir. 1973) (agency must consider all relevant evidence).

We express no opinion as to the proper resolution of this dispute on remand. We recognize the difficulty of interpreting a silent tariff. This difficulty does not, however, excuse the Commission from its obligation to engage in reasoned decision making by providing an explanation for accepting one interpretation and rejecting another.

We have considered the rest of the arguments raised by the parties, and find that they do not alter our decision. We vacate Part IV and Order "D" (under "The Commission Finds and Orders"), plus all of Order 225-A, and remand to the Commission for further consideration.

29 FERC ¶ 61,205 (1984)

Consolidated Gas Company of Florida, Inc. v. Florida Gas Transmission Company, Docket No. CP82-342-001

Opinion No. 225-A; Order Denying Rehearing

(Issued November 19, 1984)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, A.G. Sousa, Oliver G. Richard III and Charles G. Stalon.

[Note: Opinion No. 225 affirming Initial Decision directing connection of facilities and the sale and delivery of natural gas, issued September 19, 1984, appears at 28 FERC ¶ 61,350.]

On September 19, 1984, the Commission issued Opinion No. 225 in this proceeding.[1] In that Opinion, the Commission directed Florida Gas Transmission Company (FGT) to connect its facilities to those of Consolidated Gas Company of Florida, Inc. and to sell and deliver 600,000 therms of natural gas per year to Consolidated. The Commission also concluded that Consolidated should bear the cost of connecting FGT's facilities to Consolidated's facilities. On October 18, 1984, Consolidated filed an application for rehearing of that condition.

In Opinion No. 225, we stated:

> The next issue is whether Consolidated or FGT should bear the cost of connecting FGT's facilities to Consolidated's facilities. It is undisputed that section 14 of FGT's tariff requires existing customers to pay that cost in full as an aid-to-construction. We agree with the law judge that that section is silent with respect to new customers. We do not agree, however, that this means that FGT must bear the cost. True, a pipeline company may have separate sets of criteria with respect to new and existing customers, but only "as long as the difference does not embody undue discrimination against either group."[2] Assuming that the silence of FGT's tariff amounts to an announced policy of non-contribution by new customers, we find that FGT's separate unexplained policies for new and existing customers is unduly discriminatory against existing customers. Hence, Consolidated must pay a full aid-to-construction.[3]

Consolidated argues that there is no support for our conclusion that the treatment of different customers differently is unduly discriminatory, that even if it is unduly discriminatory we cannot cure it by creating an obligation not found in FGT's tariff instead of eliminating the obligation of existing customers to make contributions, and that if FGT had filed a tariff requiring contributions from new customers for initial laterals it (Consolidated) would have protested the tariff as a prejudicial departure from 25 years of practice.

A tariff policy that treats new and existing customers differently is unduly discriminatory unless the discrimination is justified. Here, no defense of the discriminatory policy has been offered, and none is readily apparent to us. Hence, we cannot approve that policy.

We do not agree with Consolidated that our sole curative power over the undue discrimination is to strike down the requirement of FGT's tariff that existing customers make contributions. FGT's provision as to their customers is valid under the Natural Gas Act and our regulations. We will not strike it down. Our broad remedial powers under the Act permit us to cure the undue discrimination by striking down the preference it creates in favor of new customers by requiring these customers to pay a full aid-to-construction.

Under FGT's tariff prior to the tariff at issue here, existing customers had to pay a full aid-to-construction with respect to additional delivery points to their existing systems, and all customers (existing and new) had to pay an aid-to-construction, if any, as determined under a formula, for initial service to a new service community. A total non-contribution policy is permitted by our regulations, as is a policy of total contribution.[4] A switch by FGT either to or away from either policy would have been lawful.[5]

The Commission orders:

Consolidated Gas Company of Florida, Inc.'s application for rehearing of Opinion No. 225 is denied.

Footnotes

[1] 28 FERC ¶ 61,350.

[2] *Statement of Lateral Line Policy In Rate Schedules Filed By Natural Gas Pipeline Companies*, 40 FPC 46, 48 (1968).

[3] 28 FERC at p. 61,638.

[4] 18 C.F.R. § 154.39(b).

[5] *Cities Service Gas Co.*, 44 FPC 163, 166 (1970), *aff'd, Municipal Distributors Group v. F.P.C.*, 469 F.2d 741 (D.C. Cir. 1972). Consolidated seems to argue that because FGT once built connecting laterals at its own expense, it must do so forever. We can't accept this. As stated in the text, our regulations permit a pipeline company to choose its own nondiscriminatory contribution policy. *Northern Natural Gas Co.*, 13 FPC 32, 35–36 (1954) cited by Consolidated is not to the contrary. True, there, the Commission did not let Northern require contribution from new customers. But that was because Northern provided city-gate service to its existing customers at Northern's expense. Here all customers will have to pay full aids-to-construction to FGT.

28 FERC ¶ 61,350

Consolidated Gas Company of Florida, Inc. v. Florida Gas Transmission Company, Docket No. CP82-342-000

Opinion No. 225; Opinion and Order Affirming Initial Decision Directing Connection of Facilities and the Sale and Delivery of Natural Gas

(Issued September 19, 1984)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, A.G. Sousa, Oliver G. Richard III and Charles G. Stalon

[Note: Initial Decision of the Administrative Law Judge granting Section 7(a) application, issued November 21, 1983, appears at 25 FERC ¶ 63,039.]

Appearances

Platt W. Davis, III and *William V. Allison* for Florida Gas Transmission Company

William I. Harkaway and *Douglas M. Canter* for City Gas Company of Florida

Eugene E. Threadgill and *William R. Cannole* for Consolidated Gas Company of Florida, Inc.

Vera Callahan Neinast, Marilyn Doria, and *Demetrios G. Pulas, Jr.* for the staff of the Federal Energy Regulatory Commission.

I.

This Opinion deals with an application by Consolidated Gas Company of Florida, Inc. under Section 7(a) of the Natural Gas Act.[1] Consolidated sells propane gas to over 1,900 residential customers in Dade County, Florida. It wants to convert its propane gas system to a natural gas system. To do that, it must buy gas from Florida Gas Transmission Company ("FGT"). But FGT is an unwilling seller. Therefore, Consolidated asks that we direct FGT to (1) connect its facilities to Consolidated's facilities and (2) sell and deliver natural gas to Consolidated. FGT and City Gas Company of Florida ("City"), a competitor of Consolidated, oppose Consolidated's request. Our staff sides with Consolidated. An administrative law judge granted Consolidated's application.[2] We agree with modifications.

II.

We may issue a Section 7(a) direction when we find "such action necessary or desirable in the public interest," if we find "that no undue burden will be placed upon" the recipient,

provided that the recipient's "ability to render adequate service to its customers" is not impaired. It is undisputed that there will be no undue burden on FGT and that FGT's ability to serve will not be impaired.[8] And we so find.

The criteria to be applied under Section 7(a)'s prescription of "necessary or desirable in the public interest" include whether the pipeline company is the applicant's most feasible source of supply; whether there is a public need for, and will be a public benefit from, natural gas service in the area involved; whether the proposed project can be financed; and whether the project is economically feasible.[4] The only criterion at issue is whether Consolidated's project is economically feasible.[5]

III.

There is no doubt that Consolidated's proposed project would be economically feasible, if City did not have its eye on capturing Consolidated's propane gas customers. FGT and City argue that the project is not economically feasible for Consolidated because it will be unable to effectively compete with City. They also say that the propane gas customeers will be better off buying natural gas from City. Both contentions are grounded on FGT's and City's view that City's rates will be lower than Consolidated's rates.

FGT and City observe that City's rates are now much lower than the rates which Consolidated's witness presented.[6] Consolidated answers that it can offer "residential rates only fractionally above City's rates."[7] It therefore "does not believe that its customers will elect, *en masse*, to pay City's [healthy] connection charge and submit to the physical disruption of their community."[8] Our staff points out that the rates are subject to state regulation and that City's rates do not reflect the "substantial cost of attaching customers" to City's system." Staff submits that "any rate speculation was just that: speculation." This, it says, is of "little probative value."[10]

We admit that it is difficult to predict whether Consolidated's project will be a success. But we need not make a "conclusive, definitive, formal finding" of economic feasibility.[11] It is enough that there is a possibility of economic success. We think there is enough of a reasonable likelihood that Consolidated will retain its present customers and, therefore, be successful as a natural gas distributor for us to grant its request. The fact that its market is threatened by competition from City does not lead us to deny that request, for we do not think it in the public interest to deny Consolidated the right to compete.[12] The record shows that standing alone both Consolidated and City

could successfully serve Consolidated's customers. We do not believe it is appropriate for us to determine which is the rightful distributor. That should be done by Consolidated's customers. We should not deprive them of the right to choose between two competitors for thier natural gas service.[13] Accordingly, we grant Consolidated's application as modified below.

IV.

The next issue is whether Consolidated or FGT should bear the cost of connecting FGT's facilities to Consolidated's facilities. It is undisputed that section 14 of FGT's tariff requires existing customers to pay that cost in full as an aid-to-construction. We agree with the law judge that that section is silent with respect to new customers. We do not agree, however, that this means that FGT must bear the cost. True, a pipeline company may have separate sets of criteria with respect to new and existing customers, but only "as long as the difference does not embody undue discrimination against either group."[14] Assuming that the silence of FGT's tariff amounts to an announced policy of non-contribution by new customers, we find that FGT's separate unexplained policies for new and existing customers is unduly discriminatory against existing customers. Hence, Consolidated must pay a full aid-to-construction.

V.

The next issue is what should be Consolidated's annual volumetric entitlement. We affirm and adopt the law judge's decision that Consolidated is entitled to 600,000 therms per year.[15]

VI.

We turn to the question of what route FGT's new lateral for serving Consolidated should take. FGT does not except to the law judge's finding that "route 1A is the least environmentally harmful route" and "is a superior route" to the proposed and other alternative routes.[16] FGT excepts to his requirement that it must use route 1A. FGT argues that "the choice of route is one for the Dade County Authorities."[17] It says that if these authorities do not select Alternative 1A, it (FGT) will have to ask us to amend our order. This, it notes, will cause unnecessary delay in building a connecting lateral. It adds in a footnote that it sees no reason why it should be precluded from advocating its preferred route before the Dade County authorities.

Our staff responds that the Commission has a "substantial interest in the route" because the lateral is a jurisdictional facility, that "while none of the analyzed routes were environmentally hazardous, one route (Alternative 1A) was clearly superior," and that that route is "environmentally preferable."[18] It concludes that we should require FGT to use Alternative 1A as the route for the lateral.

We agree with the staff that we have the power to mandate a route for FGT's lateral. But we see no reason to exercise that right in this case. FGT's lateral will travel through commercial and residential areas of Dade County. We understand that that County's authorities are evaluating the various proposed routes, including Alternative 1A. True, for the reasons given in the initial decision, Alternative 1A is more environmentally acceptable than the other proposed routes.[19] Those other routes, however, are not environmentally unacceptable.[20] Therefore, in the interest of comity, we think the Dade County authorities should select the route. Our only requirements are that FGT present to those authorities our view that Alternative 1A is the preferred route[21] and that FGT report to us which route is selected prior to the commencement of construction.[22]

VII.

The law judge directed that "the authorized lateral line shall be established and service shall commence within 6 months from the date of a final Commission order."[23] City asks that we reduce the period to three months to avoid customer "suspense as to whether the conversion will take place."[24] Our staff has no objection to this request. FGT takes no position on this issue. Consolidated wants six months. It says that that is a conservative estimate of the time needed for construction. We agree with the judge on this issue. We see no reason to rush the project. Customer suspense seems likely to be alleviated by the start of construction. Moreover, we see no reason why FGT or Consolidated would delay construction.

The Commission finds and orders.

(A) The initial decision is affirmed except as modified above.

(B) It is necessary and desirable in the public interest to direct FGT to establish a physical connection with and make sales to Consoldiated as more fully described in the application.

(C) Respondent is directed to construct facilities, to sell, and to deliver volumes sufficient to meet Consolidated's requirements as set forth in this opinion and order.

(D) Applicant shall reimburse respondent for the cost of construction of the facilities.

(E) Applicant shall be prepared to receive service as directed within six months from the date of this order.

(F) Respondent shall report to the Commission in writing the date of commencement of service to Applicant within ten days thereof.

Footnotes

[1] 15 U.S.C. § 717f (1976 and Supp. IV 1980).

[2] 25 FERC ¶ 63,039 (1983).

[3] As we shall see, there are disputes about whether Consolidated or FGT should pay for the cost of connecting the two systems and about how much gas Consolidated may buy from FGT. But, FGT makes no claim of undue burden or impaired ability to serve.

[4] These criteria are of long standing. For example, *Panhandle Eastern Pipe Line Co.*, 15 FPC 1421, 1425 (1956).

[5] FGT is the only source of gas. The public, that is Consolidated's current propane gas customers, both need and will benefit from cheaper natural gas service. No one challenges Consolidated's ability to finance its conversion from a propane gas system to a natural gas system.

[6] City's rates are claimed to be 50 cents per therm. Consolidated is not now in the natural gas distribution business. Its rates are predicted to be 79 cents per therm. City also adds in a monthly charge of 20 cents per therm for it and 38 cents per therm for Consoldiated. Consolidated does not dispute these additional charges.

[7] Reply Brief of Consolidated at page 13. The statement in the text appears based on Consolidated's lowering its rates to compete. This means that Consolidated would accept a "lower rate of return on its investment base." Reply Brief at 12.

[8] Reply Brief at 13. We note that since the close of this record the Florida Public Service Commission has granted a rate increase to Miller Gas Company, an existing natural gas company and an affiliate of Consolidated. We have also been informed that City's request for increased rates is pending before the Florida Commission.

[9] Brief of the Commission Staff Opposing Exceptions at 11. Also see Reply Brief of Consolidated at 13–15 and the initial decision at 25 FERC at 65,106. City is silent on this point. We are unable to determine the amount of this charge. But it seems substantial.

[10] Brief of the Commission Staff Opposing Exceptions at 11.

[11] *Chattahoochee Valley Gas District*, 32 FPC 811, 821 (1964).

[12] And at bottom that is what we are concerned with—the public interest. If we deny Consolidated's request, City will win the war by default.

[13] Where, as here, we can find no damage to the customer, we think it wise to err on the side of competition.

[14] *Statement of Lateral Line Policy In Rate Schedules Filed By Natural Gas Pipeline Companies*, 40 FPC 46, 48 (1968).

[15] 25 FERC at pp. 65,107–65,109.

[16] 25 FERC at p. 65,102.

[17] Brief on Exceptions at 30.

[18] The quotations are from the Staff's Brief Opposing Exceptions at 17 and 18.

[19] 25 FERC at p. 65,102.

[20] We refer to the route proposed by Consolidated and FGT and to the staff's alternative routes 1 and 2.

[21] If that has not already been done.

[22] Of course if a route besides route 1A or those referred to in footnote 20 *supra*, is selected by the Dade County authorities, we would have to rule on that route before giving it our imprimatur.

[23] 25 FERC at p. 65,109.

[24] Brief on Exceptions at 23.

25 FERC ¶ 63,039

Consolidated Gas Company of Florida, Inc. v. Florida Gas Transmission Company, Docket No. CP82-342-000

Initial Decision of the Administrative Law Judge Granting Section 7(A) Application

(Issued November 21, 1983)

Bruce L. Birchman, Presiding Administrative Law Judge

Appearances

Platt W. Davis, Jr., and *William V. Allison* for Florida Gas Transmission Company

William I. Harkaway and *Douglas M. Canter* for City Gas Company of Florida

Eugene E. Threadgill for Consolidated Gas Company of Florida, Inc.

Vera Callahan Neinast, Marilyn Doria, and *Demetrios Pulas, Jr.*, for the Staff of the Federal Energy Regulatory Commission

This decision grants a section 7(a) application and finds it necessary and desirable in the public interest for the Commission to issue an order which directs Florida Gas Transmission Company (FGT) to establish a new delivery point, and to sell and deliver to Consolidated Gas Company of Florida, Inc. (Con Gas) not exceeding 600,000 therms[1] of natural gas annually. The decision finds that no contribution in aid of construction for the lateral line is required of Con Gas under FGT's tariff. The decision also finds that alternatives to the application proposed by intervenor City Gas Company of Florida (City Gas) have not been shown to be feasible and are not in the public interest.

Procedural History

By an order issued May 17, 1983, 23 FERC ¶ 61,229, the Commission assigned the section 7(a) application for hearing pursuant to sections 7 and 15 of the Natural Gas Act (Act). Among the issues set for hearing was the scope of FGT's lateral line tariff policy change effective June 7, 1982, in light of 18 C.F.R. § 154.39 (23 FERC at p. 61,489), and whether Con Gas

would be a responsible purchaser. (23 FERC at p. 61,489) The case was assigned to me on May 18, 1983. I convened a prehearing conference on June 7, 1983. My order of August 11, 1983, adopted the joint stipulation of issues set forth in the Appendix as proposed by the parties and Staff. The stipulation of issues has governed this adjudication.

The record consists of a transcript of 361 pages, 38[2] exhibits, and 3 items by reference. Trial was held on September 26, 1983, and September 27, 1983. Simultaneous initial briefs were filed by Con Gas, intervenors FGT and City Gas, and Staff on October 28, 1983, and like reply briefs were filed on November 14, 1983. On October 28, 1983, Con Gas filed a motion for judicial notice of those portions of the FGT tariff set forth in footnote 3. Good cause is present to grant this unopposed motion. In compliance with my order of October 27, 1983, Ex. 38, a joint stipulation between FGT and Con Gas of those portions of FGT's tariff which would be applied to calculate the rate for any jurisdictional sale of natural gas by FGT to Con Gas, was filed on November 14, 1983, by those parties and is admitted in evidence. My initial decision is based on the entire record, including the briefs of the parties and Staff.

On brief, Con Gas maintains essentially that its proposal with a *reduced* annual volumetric entitlement of 600,000 therms will benefit its existing residential customers and will be in the public interest. Staff agrees that approval of the application is in the public interest subject to adoption of its alternative 1A routing for the lateral line, and to a 600,000 therm annual volumetric entitlement so long as it is consistent with FGT's tariff. Staff disagrees with FGT and City Gas in their opposition to the application on the ground that it is contrary to its tariff lateral line policy to require FGT to bear the estimated $250,000 construction cost of the lateral line. In this respect, FGT argues, *inter alia,* that because of its corporate affiliation with Miller Gas Company of Florida (Miller), Con Gas should be considered an *existing customer* as that term is used in the tariff. Staff maintains that this is inconsistent with the fact that Con Gas is a discrete corporation. FGT also argues that City Gas could better provide natural gas service to the Con Gas market area by less costly means. City Gas is a jurisdictional customer of FGT and a local distribution company whose

market area encompasses that of Con Gas. (Item C by Reference.) It joins FGT in opposing the application for the reason last mentioned. City Gas claims that its alternative is more in the public interest.

FGT and City Gas also maintain that if the application is approved, a lesser volumetric entitlement than that applied for is warranted. FGT and City Gas differ with Staff with regard to the level of any appropriate volumetric entitlement and over the matter of whether Con Gas should receive its own volumetric entitlement. FGT and Con Gas urge that any approval embrace the proposed route and not Staff alternative 1A. In prefiled testimony, but not on brief, City Gas added that Con Gas had understated the construction cost of the lateral line, and that Con Gas lacked the financial resources and technical expertise nesessary to effect conversion of its system.

Discussion and Conclusion

The stipulated issues are discussed below in a manner conducive to disposition.

Con Gas is the owner and operator of an underground propane gas distribution system which presently serves 1,900 to 1,950 high priority residential customers (Tr. 79) in an incorporated area known as the Bel-Aire/Point Royale subdivision in Dade County Florida. (Ex. 20.) It has served that area for approximately 20 years. The system is composed of a network of 2, 1½, and 1 inch lateral lines, and two 4 inch main lines which are located on either side of a canal that bisects the service area. To facilitate conversion of its system to natural gas, Con Gas filed an application under section 7(a) of the Natural Gas Act on May 21, 1982, which requested that the Commission issue an order directing FGT to construct and operate a lateral pipeline of approximately 3,500 feet in length, in addition to metering and regulating facilities necessary for the jurisdictional sale and delivery of natural gas to Con Gas.

In the interim between the filing of this application and the hearing, City Gas extended its natural gas distribution system into the Con Gas market area. Since early 1982 City Gas induced 8 commercial customers (Tr. 129) and 70 residential customers of Con Gas to become City Gas customers. (Tr. 70, 78, 129.) As a result, fuel use by Con Gas has continued to decline since the filing of the section 7(a) application. In the

twelve-month period ending June 30, 1983, Con Gas fuel use was 491,740 therms or approximately 49,000 Mcf. (Ex. 30.) This represents a 16,000 Mcf drop from 1981. Its present fuel use is less than 49,000 Mcf because an additional 6–12 residential customers were attached by City Gas after June 30, 1983.

Con Gas witness Fleisher estimated the cost to Con Gas of converting its distribution system from propane gas to natural gas and the cost of converting customers' appliances at $183,000. This figure makes no provision for payment of the construction cost of the lateral line necessary to connect the Con Gas and FGT systems (Ex. 1, p. 7) which all parties and Staff agree would approximate $250,000 for the proposed route, and at least $283,000 for Staff alternative route 1A discussed later.

In prefiled testimony but not in its brief, City Gas witness David Langer,[4] senior vice-president of City Gas, argued that the Con Gas estimated $250,000 construction cost is understated as it fails to reflect the cost of a pressure test of the Con Gas system prior to conversion which City Gas claims is necessary to permit safe operation at an inlet pressure of 60 psig. Langer estimated the cost of this pressure test at $25,000. (Ex. 29, p. 7.) The record shows this assertion to be unfounded.

Con Gas witness James Sapp testified that such an inlet pressure was unnecessary for safe operation of the Con Gas distribution system. Sapp is operations manager for Con Gas and, its corporate affiliate, Miller. Miller is a local natural-gas distribution company which serves a market area adjacent to Con Gas, and also is a jurisdictional customer of FGT. Sapp testified that Miller operates at a maximum pressure of 30 psig, (Tr. 167, 189) and that Con Gas too could be operated at the same maximum pressure. (Tr. 156–57, 162–64, Ex. 19, pp. 4–5.) Sapp also testified that safety officials of the Florida Public Service Commission had stated to him that pressure testing of the system was unnecessary. (Tr. 188.) This was not controverted by City Gas.

Sapp has 30 years of experience in operating gas distribution systems, including City Gas and Miller as well as experience in operating the Con Gas propane system. City Gas witness Langer lacks extensive familiarity with the Con Gas system. In response to an inquiry about the appropriate operating pres-

sure for the proposed Con Gas natural gas system, FGT witness Burgin testified, "I know absolutely nothing about Consolidated." (Tr. 318.)

In these circumstances, I find that City Gas has failed to establish that it is appropriate to operate the Con Gas system at an inlet pressure of 60 psig. I further find that Con Gas has demonstrated satisfactorily that it can operate the proposed natural gas distribution system safely at a 30 psig maximum inlet pressure. Consequently, I find that the cost to Con Gas to convert its propane gas distribution system to natural gas is $183,000 as estimated by Fleisher.

Con Gas, FGT, and City Gas now generally agree that the cost of the proposed lateral line is approximately $250,000. At trial, Con Gas stipulated that the small difference in price between four-inch pipe which would be used for this lateral line and smaller dimension pipe which it originally felt was appropriate was not significant enough to warrant contesting FGT's estimated $250,000 lateral line construction cost. (Ex. 24, Tr. 47.)

Staff argues that the proposed route of the lateral line is not as environmentally acceptable as alternative 1A recommended by Staff witness Taylor. The routing of the lateral line proposed by Con Gas conforms to the recommendation of FGT. (Tr. 284.) It is the least costly of all of the routes evaluated by Taylor (Tr. 190), and, based solely on the cost factor, is supported by both Con Gas and FGT.

The proposed route would extend 3,500 feet from FGT's main line south of U.S. 1 at S.W. 199 Street along Lenaire and Belview Drives to a Con Gas storage and distribution facility on Belview Drive. Most of this routing, would pass through a developed residential neighborhood. The lateral line would be placed in the grassy swale area which runs parallel to paved roads, and would cross the property lines of 37 residences. Construction of this lateral would necessitate the digging of a trench 2 feet wide and 3 feet deep. (Ex. 26.)

Staff witness Taylor concluded that the proposed route would have no major impact on the quality of the human environment, and, consequently, that the issuance of a draft environmental impact statement was not required by the Commission's Rules of Practice and NEPA. This is uncontroverted and found appropriate.

Taylor initially sponsored an environmental evaluation (Ex. 26) which identified five alternative routes. He believed each of these five alternatives to have fewer detrimental effects than the proposed route in terms of noise, inconvenience, and other construction problems which impact on residential neighborhoods. Alternative 3 and Alternative 4 are predicated on tie-ins with City Gas Company. I find that each of these alternatives is neither feasible nor reasonable since it is undisputed that City Gas and Con Gas have not been able to reach any agreement concerning the sale of natural gas by City Gas to Con Gas in lieu of the Con Gas application proposal.

Alternative 1 would run from the tie-in on U.S. 1 along the east side of U.S. 1 to its intersection with Marlin Drive. This route would then follow Marlin Drive to Belview Drive. This 3,625 foot lateral line would be built on or adjacent to commercial areas. Alternative 1 was criticized by Con Gas as requiring removal and replacement of existing sidewalk along U.S. 1. This would disrupt traffic and businesses, and be more expensive than the FGT proposed route. (Ex. 19, p. 7.)

Alternative 2 would run along the west side of S.W. 103 Ave. to its intersection with Marlin Drive. The lateral would then follow the same route as alternative 1. A portion of this 3,750 foot route would be adjacent to an apartment complex. The remainder of the route would be adjacent to unoccupied or commercial areas. Alternative 2 was criticized by Con Gas for necessitating the cutting of pavement along the entire length of the route. (Ex. 19, p. 7.)

In response to these criticisms of alternatives 1 and 2, Taylor recommended a fifth route, alternative 1A, as environmentally preferable to the proposed route and these alternatives. Alternative 1A is identical to alternative 1 *except* that it runs along the west, rather than the east side of U.S. 1. Taylor recommended that approval of the Con Gas application be subject to the condition set forth in footnote 5 which, *inter alia*, designates alternative 1A as the route for the lateral line. (Ex. 27, p. 2.)

At the hearing and in their initial briefs, FGT and Con Gas urged that alternative 1A should not be considered a feasible alternative because it would cost $19,000 more than the proposed route (Tr. 283) due to the need for tunneling under U.S. Highway 1. FGT witness Burgin speculated that alternative 1A

may entail additional cost due to uncertainties regarding the location of utilities in the area. Staff Ex. 37, a letter from James Bowers, Supervisor of the Permits and Underground Section of the Dade County Public Works Department, advised Staff that he had not been able to verify the extent to which utilities and private easements might affect the use of alternative 1A. The letter also indicates that despite uncertainties as to the location of utilities in the area, alternative 1A is the preferable route for the lateral line because it would result in the least disruption and inconvenience to citizens of the state of Florida, and is safer. It would be in a less populated commercial area compared with the proposed route which would place a gas feeder main in a highly populated residential area.

It is clear that due to their greater length, Staff alternative routes 1, 1A, and 2 will be somewhat more expensive than the proposed route. Staff witness Taylor established that the proposed route will result in significant disruption to residential neighborhoods, as well as potentially greater public safety hazards, in comparison to alternatives 1 ,1A, and 2. (Ex. 25, pps. 2, 3, 5.) Alternative 1A is environmentally superior to the proposed route and to alternatives 1 and 2. On the present record, purely economic considerations are clearly outweighed by the greater public interest in avoiding known environmental hazards associated with the proposed route. I find that Staff alternative route 1A is the least environmentally harmful route, is a superior route to the proposed route and to alternative routes 1 and 2, and, consequently, as set forth in footnote 5 is authorized as the route most necessary and desirable in the public interest.

In light of the above, I find that the known cost of constructing a lateral line to connect the FGT and Con Gas systems would approximate $269,000. Of this amount, $250 000 was estimated by FGT as the cost of building the proposed lateral line, and $19,000 represents known additional costs attributable to the use of alternative lA for the lateral line. The required facilities are those set out in Exhibit 22 and include the 4 inch pipeline, hot tap, and metering station. In the event that any further studies indicate a material increase in the cost of alternative 1A, Con Gas and FGT are free to file a petition to reopen the record and seek approval of alternative 1 or 2 which are

environmentally superior to the proposed route. To ensure that the line is constructed to meet the needs shown on this record, the interconnection shall be established and service shall commence within 6 months from the date of a final Commission order, and this fact shall be reported to the Commission.

Stipulated issue 3(b)(ii) is whether FGT's tariff requires a contribution in aid of construction. FGT and City Gas argue that the lateral line policy enunciated in FGT's tariff (Ex. 4) requires Con Gas to bear the specified tariff costs of the lateral line. Essentially, FGT and City Gas contend that Con Gas should be considered to be an *existing customer* of FGT as that term is employed in section 14 of FGT's tariff rather than a new customer of FGT. FGT witness Burgin and City Gas witness Langer testified[6] that Con Gas and Miller should be treated as the same entity for purposes of this case as Miller is presently an FGT customer, and as Con Gas and Miller have common stockholders and utilize the same employees. In effect, these two parties urge the Commission to "pierce the corporate veil."

As discussed more fully later, under the terms of section 14 of the FGT tariff an *existing customer* is required to pay for the cost of all additional facilities necessitated by the attachment. (Ex. 4.) If Con Gas was deemed to be an *existing customer* of FGT, FGT argues that it would not be necessary to establish a separate volumetric entitlement for Con Gas as Miller's volumetric entitlement is sufficient to meet its own needs and those of Con Gas. Con Gas seeks an annual volumetric entitlement not exceeding 600,000 therms, or, if its needs are to be considered with Miller, an increase in Miller's volumetric entitlement to the same extent.

The equitable remedy of "piercing the corporate veil" runs counter to a policy in favor of incorporation and the inherent limitation of liability which flows from corporate status. The remedy is extraordinary for this reason. It has been employed in instances where recognition of the corporate form would have worked to defeat an overriding public policy underlying a federal statute and where the public policy was clear from the statute itself. *E.g., New Colonial Ice Co. v. Helvering*, 292 U.S. 435 (1934), and *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946).

FGT and City have made no showing that any federal policy would be disserved if the so-called corporate veil was to be

pierced and Con Gas was to be treated as an existing customer in light of its corporate affiliation with Miller. In response to my inquiries at the hearing, City Gas witness Langer admitted that he knew of no such policy. (Tr. 257.) Langer conceded that Con Gas and Miller are legally different and distinct companies. (Tr. 259.) Neither City Gas nor FGT has suggested, much less demonstrated that any fraud or deceptive practice has been perpetuated by Con Gas which would warrant invocation of an extraordinary equitable remedy. FGT concedes as much on brief (R.B., 6.) Staff agrees with this conclusion. On this record, City Gas and FGT clearly have failed to meet their burden of demonstrating a basis for treating the two discrete corporations as one for the purpose of this proceeding.

FGT also contends that even if Miller and Con Gas are considered as the separate legal entities which they are, Con Gas is required to pay for the construction cost of the lateral line under the terms of section 14 of FGT's tariff.

FGT has two provisions in the "General Terms and Conditions" section of its tariff which relate to lateral line facilities. Pertinently, section 5, "Measuring Equipment," subparagraph (a), "Installation and Operation,"[7] states that FGT will "install, maintain and operate at its own expense, except as provided in section 14 hereof, all necessary metering equipment." As seen, this provision makes no mention of lateral line construction *per se*. It only requires FGT to bear the cost of "all necessary metering equipment" . . . "except as provided in section 14."

Section 14, "Procedure for New Service" consists of five unnumbered paragraphs.[8] The first paragraph requires a request for the proposed service, including all pertinent information to be made to FGT. The second paragraph provides that FGT shall respond within 30 days to that request for service and advise "whether Seller will agree to provide the required service, and if so, the conditions under which the service will be provided." The third paragraph goes on to relate the terms upon which FGT will provide service to "existing resale customers." Subparagraph (a) of that paragraph concerns construction of a lateral line requested by "existing resale customers already being served" and, *inter alia*, provides that such a customer "contributes an aid-to-construction amount to Seller which is equal to the cost of the additional facilities including all costs involved in obtaining all licenses and permits required

sets for the services." Subparagraph (b) of that paragraph sets forth additional requirements for "existing resale customers requesting a new delivery point" which will not be connected to its existing distribution system. The fourth paragraph accords FGT the discretion to contest a section 7(a) application, and, in a section 7 proceeding, to request a waiver of its lateral line policy. The last paragraph provides for cancellation of the tariff.

It is undisputed that Fleisher, in his position as controller for Con Gas, requested FGT on March 9, 1982, to advise Con Gas whether FGT would be willing to file a section 7(a) application, and to recommend the most economical means to accomplish conversion to natural gas service not exceeding 750,000/1,000,000 therms annually. (Ex. 24, p. 1.) FGT responded on April 2, 1982, to Fleisher in his position as controller of Miller, with three options: (1) extension of a line from Miller to Con Gas which FGT considered might not be economically feasible because of the distance involved, (2) the establishment of a new delivery point for Miller on FGT's line which would cost approximately $250,000 and be borne by Miller,[9] and (3) the purchase by Miller of natural gas from City Gas for resale to the then 2,000 Con Gas residential customers. As a result, Con Gas filed the section 7(a) application for an order compelling FGT to construct the lateral line, establish a new delivery point with Con Gas, and to engage in a jurisdictional sale of natural gas to Con Gas.

FGT witness Burgin stated that FGT complied essentially with its tariff requirements by its response to the Con Gas request for service. (Ex. 21, p. 6.) Con Gas does not deny that it received notice of FGT's response, *albeit* it was directed to Fleisher as an official of Miller (Fleisher is Vice President, Finance of Miller) rather than in his separate position as controller of Con Gas.

Burgin testified further that section 14 of the tariff specified the conditions under which FGT would provide service (Ex. 24, pp. 6–7), that section 14 concerns new service to new customers since it addresses requests for new service by companies currently distributing artificial gas, and that Con Gas should be treated as an "existing customer" within the meaning of section 14 because of its corporate affiliation with Miller. (Ex. 24, p. 8 and R.B., 7–8.) This FGT tariff provision reflects a change in FGT's tariff policy expressly as concerns "existing

customers" referenced in section 14. (Ex. 4, p. 5.)

In response to my inquiry, Burgin conceded that its tariff does *not* spell out his interpretation of the tariff—that a corporation seeking to purchase gas which is affiliated with an existing customer of FGT shall be considered as an existing customer. (Tr. 277.) In fact, section 14 of the tariff makes no specific mention of new customers, nor of any generally applicable policy regarding a contribution in aid-of-construction from a corporate affiliate of an existing customer such as Con Gas which has requested service. (FGT R.B., 8.) Read as a whole, section 14 of the tariff in no way refers to the payment of lateral line construction costs by a *new* customer. On the other hand, the third paragraph of section 14 unequivocably specifies that "existing customers" must make a contribution-in-aid of construction equivalent to the construction cost of lateral line facilities. In these circumstances the argument of FGT that Con Gas as a new customer of FGT is obligated by section 14 of FGT's tariff to pay for the construction cost of the lateral line is without merit.

FGT's tariff interpretation also is contrary to 18 C.F.R. § 154.39(b) which governs the general terms and conditions of a tariff. Pertinently, § 154.39(b) provides that the general terms and conditions of a tariff *shall* contain a statement of the company's policy[10] with respect to the financing and/or construction of a sales lateral "to deliver natural gas to one or more customers of the company inclusive of both *new* and present purchasers." (Emphasis supplied.) Section 154.39(b)(1)(i) provides that,

> ". . . *if* it is company policy to build or contribute to the construction of any sales lateral to resale customers, the tariff shall be "formulated so as to facilitate ready computation of the respective contributions to sales lateral construction of the pipeline company and its purchaser. Reference to imprecise criteria . . . will be unacceptable." (Emphasis supplied.)

Section 154.39(b)(2) specifies that *if* the desired company policy is such that it will *not* build or contribute to construction costs, "the policy statement *shall* read as follows: the company will not build or contribute to the cost of building any sales lateral pipelines to resale customers." (Emphasis supplied.)

Section 14 of the FGT tariff does not effectuate an affirmative company policy to require a contribution in aid of construction for sales laterals to new customers as is required by 18 C.F.R. § 154.39. On brief, FGT concedes this. (R.B., 8.) As Staff aptly notes, the first paragraph of section 14 of the tariff must be read in *pari materia* with the remainder of that provision in order to avoid reaching an inconsistent and absurd result. (Staff R.B. at 5.) Read in its entirety or read in conjunction with section 5 of the FGT tariff, section 14 does not make any express provision for the payment of lateral line construction costs by a *new* customer "formulated so as to facilitate ready computation of the respective contributions to sales lateral construction of the pipeline company and its purchaser." On the other hand, section 14 also does not contain the required statement that "the company will not build or contribute to the cost of building any sales lateral pipelines to resale customers."[11] And, as found earlier, section 14 does not provide that a corporation that requests service and is affiliated with an existing customer will *not* be considered a new customer and will *be* treated as an *existing customer* as that term is employed in section 14 of the tariff.

In these unique circumstances, I find that Con Gas is a new customer of FGT which has applied for a Commission order to direct extension of FGT's facilities to it, that FGT's lateral line policy set forth in its tariff on file with FERC requires lateral construction contributions only from "existing customers" as that term is employed in section 14 of the tariff, and, consequently, that Con Gas is not required by FGT's tariff to pay FGT the estimated $269,000 cost of constructing alternative 1A as a contribution in aid of construction.[12] In this context, FGT witness Burgin was perceptive in testifying "Perhaps, after looking at it again, we could have done a little better, and maybe another revision is in order." (Tr. 301.) I further find that in the circumstances present here, this end result is reasonable and is necessary and desirable in the public interest. Because Con Gas as a new customer of FGT is not required by FGT's tariff to make a contribution in aid of construction, disposition of stipulated issue 3(b) (iii) concerning treatment of any investment tax credit (ITC) generated by the project is unnecessary.

Stipulated issue 3(c) concerns whether Con Gas customers would benefit from the conversion to natural gas. Con Gas

advances three reasons why the conversion of its system to natural gas benefits its customers and is in the public interest. First, the conversion would result in significantly lower energy costs for Con Gas customers. (Ex. 1, p. 6.) On brief, Staff concurs (I.B., p. 4, 15), and FGT and City Gas do not dispute this. The evidence of record is uncontroverted: the price of propane is roughly twice that of natural gas (Tr. 123).

Fleisher also testified that by converting to natural gas, Con Gas could alleviate shortage problems experienced with its propane supply. (Ex. 1, p. 6.) Con Gas has been forced on several occasions to make spot purchases of propane at higher cost. (Tr. 130.) While Con Gas has not yet experienced any actual impairment of its propane service (Tr. 130), approval of the application would provide it greater and more stable security of supply.

Fleisher also testified that the application should be granted so that the Commission does not "aid and abet" the anti-competitive efforts of City Gas (Ex. 1, p. 7, and Ex. 14, pp. 4–5). An acrimonious dispute between Con Gas and City Gas attributable to the loss by Con Gas of its 8 commercial customers and 70 residential customers to City Gas culminated in pending litigation in which Con Gas alleges that City Gas has violated the federal antitrust laws.[13] Violation of the policies underlying these federal laws is germane to disposition of a section 7 application. Opinion No. 191, *Pacific Power & Light Company*, issued on October 6, 1983, 25 FERC ¶ 61,052, mimeo at pp. 57–58. This record, however, does not contain details sufficient to evaluate this matter as a public interest factor which, if proved, would weigh in favor of approval of the application. Upon conversion of its system to natural gas, Con Gas will become subject to state regulation. The pending court proceeding and the state regulatory body, in the circumstances present here, are more appropriate forums to explore the propriety of expansion by City Gas.

Stipulated issue 4 concerns whether Con Gas has the necessary financial and technical capability to provide natural gas service. The issue was raised by City Gas witness Langer but is not pressed by City Gas on brief. The record establishes that Con Gas has adequate working capital to finance the $183,000 cost to it of converting the Con Gas system to natural gas. Con

Gas also has sufficient financial resources to pay the additional $269,000 estimated cost of constructing the lateral line claimed appropriate by FGT (Ex. 10) *if* it was appropriate under FGT's tariff for Con Gas to bear that cost. As found earlier, FGT, and *not* Con Gas, is required to bear this cost.

Earlier, this initial decision found without merit the assertion of City Gas witness Langer that the appropriate inlet operating pressure for the system is 60 psig, rather than the 30 psig inlet pressure which Con Gas has established as reasonable and feasible. This is a further demonstration of necessary technical expertise possessed by Con Gas.

In their briefs, FGT and City Gas argue that if the section 7(a) application is granted, Con Gas will continue to lose customers to City Gas until its customer base is so diminished that its economic viability will be in doubt. Three alternatives to the Con Gas proposal have been suggested by City Gas. The acquisition of the Con Gas system by City Gas (Tr. 207, 209), and the purchase by Con Gas of natural gas from City Gas instead of FGT (Tr. 212), are infeasible for the reason that City Gas and Con Gas simply have not been able to reach agreement. (City Gas I.B., 13, n. 8.) A third alternative is, in effect, continuation of the *status quo* by denial of the application. If the past is prologue, denial of the application will result in the conversion of some additional Con Gas customers by City Gas. (Tr. 238.) In this regard, both Con Gas and City Gas claim to be able to provide the remaining Con Gas residential customers with natural gas at the least cost. The parties have submitted numerous and somewhat conflicting estimations of prospective nonjurisdictional rates for the retail sale of natural gas.

It appears that the nonjurisdictional rate suggested by City Gas for its service to present Con Gas customers could be lower than the level of nonjurisdictional rates suggested by Fleisher. Con Gas witness Fleisher testified that assuming no contribution in aid of construction for the lateral line was required and an annual volumetric entitlement of 500,000 therms was established, Con Gas hypothetical retail residential rates would be between .78 cents and .79 cents per therm for residential customers. (Ex. 29, p. 5, Tr. 68–70, 77–79, 105.) Hypothetical City Gas rates assertedly would be in the range of $.50 cents to $.60 cents per therm. Fleisher stated that Con Gas would not be able to reduce its rates *below* that of City Gas, (Tr. 138, 139.)

In the final analysis, the rate which Con Gas customers will pay is nonjurisdictional in nature and will be set by the state regulatory commission. On this record, it is not at all clear what rate level might be sought, much less authorized by the state regulatory commission for City Gas were it to enlarge its customer base at the expense of Con Gas, or for Con Gas were it to regain residential and commercial customers lost to City Gas and expand its customer base. In these circumstances the views of the parties regarding the hypothesized level of nonjurisdictional rates, in this light, are entitled to little probative value in evaluation of the merits of this section 7(a) application.

Any prospective rate differential in favor of City Gas may be more ephemeral than real when one considers the substantially greater cost to City Gas to attach the remaining Con Gas residential customers as compared with the materially lesser conversion cost to Con Gas. Because Con Gas can utilize existing pipe to serve its customers, its conversion cost would be lower than that of City Gas which would have to lay additional main and short line extensions to effect attachment. Con Gas witness Fleisher testified that the cost to Con Gas of conversion to natural gas without any contribution in aid of construction to FGT would be less than $200,000 (approximately $100 per customer for its 2,000 residential customers), and that if Con Gas was required to make a contribution in aid of construction of $250,000, the total out-of-pocket cost of conversion would be less than $450,000, or about $225 per customer. (Ex. 13, pp. 2–3.) City Gas offered no evidence to the contrary at the hearing. In fact, Con Gas has *overstated* this cost per customer since, as found, the conversion cost it will bear approximates $183,000.

City Gas witness Langer testified that City Gas attached 27 residential Con Gas customers out of a possible 50 customers in one residential area served by Con Gas at a cost of $872 per customer (Ex. 29, p. 7, Ex. 35, p. 1). Langer estimated that all 54 customers could have been attached at $581 per customer. (Tr. 246, City Gas, R.B., 6.) Langer also pointed to another propane system which had been converted by City Gas at an average cost per customer of $425. (Ex. 29, p. 8.) It is not at all clear that either of these attachment costs is representative of the attachment cost of the remaining Con Gas residential customers. Even if it cost City Gas only $425 per customer to attach approximately 1,950 Con Gas customers, a fact not demonstrated on this record, and that Con Gas was required to make a

$269,000 contribution in aid of construction in addition to its $183,000 conversion cost, a matter which is contrary to my earlier finding, the conversion cost to City Gas would be substantially greater than the conversion cost to Con Gas upon approval of this application. Stated differently, it would cost City Gas approximately $828,750 (1,950 customers × $425) to attach customers on the Con Gas system as compared with a conversion cost of $183,000 to Con Gas if no contribution in aid of construction is required (a differential of 4–1 in favor of conversion of the Con Gas system) or, a conversion cost of $452,000 ($183,000 + 269,000) to Con Gas if a contribution in aid of construction was required. As found earlier, a contribution in aid of construction is not required by FGT's tariff.

Additionally, it is undisputed that the fuel costs which Con Gas will charge to its customers will decline significantly if the Con Gas system is converted to natural gas. For this reason it is likely that the pace at which Con Gas has been losing customers may be greatly altered by conversion of the Con Gas propane distribution system to natural gas Approval of the application and establishment of an annual volumetric entitlement of 600,000 therms, as later discussed, also will provide Con Gas with the opportunity to expand its customer base.

In light of the above, I find that neither FGT nor City Gas has met the burden of demonstrating that denial of this application and the proposed sale of natural gas by City Gas to Con Gas is an equal or superior alternative to approval of the Con Gas application which has been demonstrated by Con Gas to be necessary and desirable in the public interest. Stated differently, neither FGT nor City Gas have demonstrated that there is a viable, feasible, and reasonable alternative to approval of the application. I find that denial of the application is *not* in the public interest, and that approval of the application is necessary and desirable in the public interest.

Section 7(a) requires that the Commission find that approval will neither impair the adequacy of service to the supplying pipeline's customers, nor place an undue burden upon the supplying pipeline company itself. The sixth stipulated issue relative to the establishment of an appropriate volumetric entitlement for Con Gas raises these statutory concerns.

An offer of settlement approved by the Commission on September 23, 1983, in Docket No. CP68-179-001 (Item B by

Reference), eliminated the establishment of volumetric entitlements for FGT high priority customers for purposes of gas supply. FGT is not presently in curtailment, and its gas supply, admittedly, is adequate to meet the volumes authorized by this decision. The establishment of a precise volumetric entitlement for Con Gas, however, is necessary for two reasons: (1) under the approved FGT settlement, volumetric entitlements of a resale customer are reinstituted as a supply constraint during any future curtailment period; and (2) volumetric entitlements are the basis for determining the minimum bill obligation of a resale customer. (Tr. 41.)

The section 7(a) application requests a 1200 Mcf daily maximum and 90,000 Mcf annual maximum volumetric entitlement commencing in 1986. (Item A, p. 2.) Con Gas projected daily and annual sales, respectively, for the first three years of operation, 1982–1985, of 1,019 Mcf/71,453 Mcf, 1070 Mcf/75,026 Mcf, and 1,124 Mcf/78,777 Mcf. (Ex. 1, p. 5, Item A, p. 2.) These projections assumed a slight increase in an average 2,148 customers served in 1981. (Ex. 2, p. 1.) Con Gas witness Fleisher modified this request in prefiled testimony to 1440 Mcf daily and 108,000 Mcf annually based upon a projected decrease in *annual* net gas sales for the period 1983–1985. (Ex. 1, p. 5, Ex. 9, pps. 4, 6, and Ex. 13, pps. 3–4, 10.) Fleisher testified that a 108,000 Mcf volumetric entitlement was necessary to permit some growth in residential customers, to regain some of its commercial customer load from City Gas, and to expand that customer base and to convert users of other fuels to natural gas. (Tr. 81–82, 86, 87, 88.) The one-third increase in this later projection of 1,440 Mcf in *daily* sales was anticipated to accrue from the addition of one to two large commercial customers. (Ex. 1, p. 5.) For the 12-month period ending June 30, 1983, Con Gas had sales of 491,740 therms (Ex. 30, IEB No. 1) based on an average 2,057 customers, which included 4 commercial customers since lost to City Gas.

Fleisher conceded that a 108,000 Mcf annual volumetric entitlement was "wishful thinking." (Tr. 81.) He testified further that in the event that FGT found it necessary to impose curtailments, an annual volumetric entitlement should not be set at *less* than 55,000 to 60,000 Mcf (550,000 to 600,000 therms). This was said to be without consideration of any future

growth or additional consumption due to severe winter conditions. (Tr. 92.) Fleisher later testified that if the Con Gas volumetric entitlement was to be included in the volumetric entitlement of Miller, Con Gas desired an annual contract quantity of 600,000 therms. (Tr. 139.) On brief, Con Gas requests that FGT be directed to sell *up to* 600,000 therms annually in order "to serve its 2000 residential customers, to regain its former commercial customers, and to attract new commercial customers." (I.B., p.3.)

FGT witness Burgin agreed that a 600,000 therm annual volumetric entitlement was not unreasonable, and would "allow for some growth. (Tr. 329.) Burgin appears to be closer to the mark than Fleisher in this perception that a 600,000 therm annual volumetric entitlement would permit some future growth when it is recalled that Con Gas sales of 491,740 therms for the year ended June 30, 1983, were based on an average 2,057 customers or some 107 customers more than it now serves, assuming that 1,950 customers are now served. FGT stipulated that its current gas supply is sufficient to accommodate Con Gas' needs. (Tr. 40.) Allowance for a reasonable amount of growth in the establishment of a volumetric entitlement is necessary and desirable in the public interest where, as here, FGT's gas supply is adequate. A 600,000 therm annual volumetric entitlement will permit the opportunity for a modest system expansion to proceed and accommodate this growth in the event of severe weather conditions.

Similar to FGT's argument vis-a-vis payment of lateral line costs, Burgin testified that instead of having a separate volumetric entitlement, Con Gas should come under Miller's volumetric entitlement. As previously discussed, because Con Gas and Miller are separate legal entities, and as this record provides no valid reason for treating them differently for the purposes of this case, Con Gas is a new customer of FGT within the scope of FGT's tariff and requires a discrete volumetric entitlement.

FGT also argues that it has insufficient capacity at a 100 percent load factor to serve Con Gas's high priority customers, while continuing to supply its low priority P-9 boiler fuel interruptible industrial customers, and so-called P-10 or dump-sale interruptible industrial customers. P-10 customers include various large municipal power systems that purchase "excess" gas from FGT. (Tr. 291–297.) Unlike P-9 customers, P-10 customer requirements are not part of the tariff data base for purposes of curtailment. (Tr. 294–95.)

Significant impairment in FGT's service to P-9 tariff customers due to the establishment of a 600,000 therm per annum volumetric entitlement for Con Gas is unlikely. Any disruption of the P-9 customers, at most, is predicted by FGT to occur for only a few days in a winter which is more severe than that of the past year. (Tr. 297–98.) Whether any actual impairment of service under such a circumstance might occur also would hinge on the inability of these interruptible customers to switch to alternative fuel. (Tr. 297.) In any event, any potential curtailment of these low priority customers on 1 or 2 of the coldest days in a year is "adequate service" within the meaning of section 7(a) of the Act. *Manufacturers Light & Heat Company v. Federal Power Com'n,* 206 F.2d 404, 408 (3rd Cir. 1953). The extent to which approval of this application might impact the even lower priority P-10 customers is not demonstrated on this record. Con Gas high priority customer needs clearly outweigh the needs of these customers which are not even calculated in any curtailment data basis. In any event, FGT itself agrees that a 600,000 therm annual volumetric entitlement is not unreasonable. In the circumstances, Con Gas has established that approval of such volumetric entitlement is in the public interest, will not impair the adequacy of FGT's service, including service to City Gas, and will not unduly burden FGT.

On brief, FGT argues that any volumetric entitlement established for Con Gas should be consistent with the manner in which other customers' volumetric entitlements were established, that volumetric entitlements were based on present sales levels adjusted for three years estimated growth, and, on that basis, a volumetric entitlement for Con Gas cannot be higher than 500,000 therms. (I.B., 11–12.) City Gas urges that any discrete volumetric entitlement level for Con Gas should be based on historic data, that this would be consistent with the

derivation of volumetric entitlements used in the settlement approved in Docket No. CP68-179-004, and, based upon historic sales data, an annual maximum level of 440,000 therms would be reasonable. (I.B., 21.) Staff demurs and suggests that the parties should calculate an appropriate number in accordance with the provisions of FGT's tariff, that Con Gas should be treated the same as all of FGT's other customers, and that Staff has no objection to an annual volumetric entitlement of 600,000 therms so long as that number is appropriate under FGT's tariff.

The manner in which volumetric entitlements were established for FGT's customers was not the subject of any of the prefiled testimony. The matter arose for the first time in response to my inquiry of FGT witness Burgin concerning the volumetric entitlement that would be appropriate for Con Gas in its own right and apart from Miller. Burgin responded that in some, if not many cases, volumetric entitlements for its present customers were based on their present level of sales projected over a 3-year growth period. There were, however, other instances where that method did not apply and some customers received a volumetric entitlement that was somewhat greater than a 3-year growth projection based on historical growth. (Tr. 326–327) Burgin suggested that if a volumetric entitlement was set, a method similar to that used when the original entitlements were set should be employed, and that he would use the current sales level (450,000 therms). (Tr. 327.) In response to further questions from the bench, Burgin stated that a 600,000 therm annual volumetric requirement would not impair service (Tr. 328) except as discussed above, and, as noted, that 600,000 therms left Con Gas some room to grow and probably was not unreasonable. (Tr. 329.)

The record evidence just discussed belies the suggestions of FGT and City Gas that FGT historically has followed a uniform approach in the establishment of customer volumetric entitlements in times, unlike now, when FGT was in curtailment. The settlement approved in Docket No. CP68-179-004 also has no precedential value in disposition of this matter, and, on its face, has no probative value in resolving this matter.

This section 7(a) application proceeding is an appropriate forum to determine a volumetric entitlement for Con Gas in the event of any future curtailment by FGT, and for the purpose of

computing the minimum bill obligation of Con Gas. The notice of the application in the Federal Register was notice to the world that Con Gas was seeking section 7(a) approval that encompassed a 90,000 Mcf annual volumetric entitlement and a lesser daily entitlement. FGT, City Gas, and one other intervenor that subsequently became inactive in this case, were the only persons that came forward to oppose the application. The order which set this case for hearing stated that gas supply must be addressed to ensure that FGT's existing customers are not adversely affected. (23 FERC at p. 61,489.) Stipulated issue 6 is directed to this, and adjudication progressed on this basis. The record establishes that an annual 600,000 therm volumetric entitlement will permit Con Gas to attempt a modest expansion, and is reasonable and necessary and desirable in the public interest. It bears repeating that it is the end result and not any particular methodology that is of paramount importance in determination of this matter. Based on this record, this end result is reasonable, is not inconsistent with FGT's tariff on file with this Commission, and is necessary and desirable in the public interest.

Based upon the record, approval of this section 7(a) application is necessary and desirable in the public interest.

Ultimate Findings and Conclusions

1. Florida Gas Transmission Company (FGT) is a natural-gas company subject to the Natural Gas Act.

2. Consolidated Gas Company of Florida (Con Gas) is a nonjurisdictional liquid underground propane distributor which, upon approval of its application under section 7(a) of the Natural Gas Act, will become a jurisdictional customer of FGT pursuant to the terms of FGT's "G" rate schedule on file with the Commission.

3. The lateral line authorized by this decision to be constructed by FGT to connect its transportation facilities with that of Con Gas per Staff alternative 1A routing as described in footnote 4 of this decision would be used in the transportation of natural gas in interstate commerce and, for that reason, is subject to the jurisdiction of this Commission.

4. The authorized lateral line shall be established and service shall commence within 6 months from the date of a final Commission order. FGT shall report to the Commission the estab-

lishment and commencement of service 6 months and 10 days after entry of a final Commission order.

5. As set forth in this decision, the establishment of an annual maximum volumetric entitlement of 600,000 therms for Con Gas is reasonable, will not unduly burden FGT, will not impair the ability of FGT to render adequate service to its customers, and is necessary and desirable in the public interest.

6. As set forth in this decision, Con Gas is financially capable of paying approximately $183,000 for certain facilities necessary to the safe operation of the lateral line authorized by this decision, must bear the cost of such facilities, and possesses the technical expertise to operate safely such facilities.

7. As set forth in this decision, Con Gas is not required by FGT's tariff to contribute to the estimated $269,000 cost of the lateral line authorized by this decision. Such cost together with the cost of tap and certain metering facilities shall be borne by FGT consistent with FGT's tariff on file with this Commission and consonant with applicable Commission regulation.

Order

Upon consideration of the entire record, including briefs, in this proceeding, *it is ordered,* subject to the Commission's Rules of Practice and Procedure that the application of Con Gas under section 7(a) of the Natural Gas Act for the issuance of an order directing FGT to provide and construct a new delivery point to connect certain jurisdictional transportation facilities directed to be constructed by FGT with those of applicant Con Gas, and to sell and deliver to Con Gas not more than 600,000 therms of natural gas annually in accordance with the applicable General Terms and Conditions of FGT's FERC Gas Tariff is necessary and desirable in the public interest and is approved, subject to the terms and conditions set forth in this decision of which this order is a part.

Footnotes

[1] The application request is delineated in Mcf units. (Item A by reference, p. 2.) FGTs tariff, Rate Schedule G, numbered paragraphs 6 and 7 reflect a rate based on daily and annual units of natural gas stated in therms. Ten therms approximate 1 Mcf. (Tr. 65.)

[2] Ex. 38 is a post-hearing stipulation of FGT and Con Gas that in the event that the section 7(a) application is granted to Con Gas as a new customer of

FGT, FGT will provide such service under its Rate Schedule G, the current rate of which is found at 31st Revised Sheet No. 3A of FGTs FERC Gas Tariff, Original Volume No. 1. It is undisputed that such initial rate is necessary and desirable in the public interest.

[3] Judicial notice will be taken of the following portions of FGT's currently effective tariff: 31st Revised sheet no. 4; fourteenth revised sheet no. 4; fourth revised sheet no. 4; second revised sheet no. 6. *first revised sheet no. 14; *original sheet no. 22; *second revised sheet no. 22-A; first revised sheet no. 23; first revised sheet no. 24; and first revised sheet no. 25. Those tariff sheets that are asterisked are part of Ex. 4.

[4] Langer adopted as his own testimony, Ex. 29, the pre-filed testimony of Ivan E. Ball. Ball is no longer associated with City Gas.

[5] Ex. 27, p. 2, sets forth this condition to approval which I adopt:

> "The tie-in on FGT's system shall be located on the west side of U.S. Highway 1. The natural gas lateral shall be constructed from this site to the proposed delivery point using Alternative 1A. The construction of the lateral shall be accomplished after consultation with the Permits and Underground Section of the Public Works Department of Metropolitan Dade County and other appropriate permitting agencies."

[6] On brief City Gas states that Con Gas is "operated as a part of Miller Gas." (Initial Brief (I.B.), 17) There is no evidence of record to support this supposition. Moreover, the systems of Con Gas and Miller have different service areas, and are located more than 12 miles away from each other. (Tr. 9.)

[7] Ex. 4, First Revised Sheet No. 14 superseding Original Sheet No. 14, effective June 1, 1972.

[8] Ex. 4, Original Sheet No. 22, effective September 13, 1962, contains the first two unnumbered paragraphs. Second Revised Sheet No. 22-A superseding First Revised Sheet No. 22-A, effective June 6, 1982, contains the third and fourth unnumbered paragraphs. The last paragraph is found on Third Revised Sheet No. 22-B, effective June 7, 1982. Ex. 4 also consists of two sheets which are no longer part of the tariff: First Revised Sheet No. 22A effective December 4, 1971, and Second Revised Sheet No. 22B effective December 4, 1971.

[9] Burgin is in error in testifying that the FGT response indicated that the $250,000 cost of the lateral line "would be borne by Consolidated or its affiliate, Miller," Ex. 21, p. 6, as the response stated that the line, plus the cost of the gate station would be in the neighborhood of $250,000 "which would be borne by Miller," Ex. 24, p. 1.

[10] In adopting the present regulation, Order No. 365, 33 Fed. Reg. 10139 (1968), noted that *"While each pipeline company would be required under the regulation to adopt and publish an explicit lateral construction policy,* each would be entitled to fashion a policy appropriate to its own special circumstances." (My emphasis supplied.)

[11] See footnote 10.

[12] As a prudent expenditure, the cost of constructing the lateral line will be added to FGT's rate base and recouped in FGT's next rate filing with this Commission. Con Gas, in this respect, will pay its *pro rata* or rolled-in share

of the construction cost of the lateral line as a jurisdictional customer of FGT.

[13] No. 83-1010-Civ.-ALH., *Consolidated Gas Company of Florida, Inc. v. City Gas Company of Florida*, an amended complaint filed by Con Gas on May 23, 1983, with the United States District Court for the Southern District of Florida comprises Ex. 14. A preliminary injunction was denied. (Ex. 14, p. 4.) In this respect I note that City Gas had lines in and around the Bel-Aire/Pt. Royale subdivision before Con Gas was in business in that area, and that no company has an exclusive franchise to serve the area. (Ex. 29, pps. 2–3.) Fleisher agreed that the Con Gas system was basically encompassed by the City Gas system. (Tr. 81.)

Appendix

Order Adopting Joint Stipulation of Issues

(Issued August 11, 1983)

Pursuant to my order of June 8, 1983, on August 1, 1983, the parties filed the Joint Stipulation of Issues that is set forth in the Appendix to this order. All active parties and Staff join in this stipulation. I find the stipulation of issues to be fair and comprehensive and, consequently, adopt the stipulation. The stipulation is binding upon all parties and Staff as concerns this adjudication.

Attachment

Stipulation of Issues

The parties to this proceeding hereby stipulate that the following matters are at issue in this proceeding.

1. Is the proposed extension of the Florida Gas Transmission Company's (FTG's) facilities in the public interest?

2. What is the market which Consolidated Gas Company of Florida (Con Gas) proposes to serve?

3. Is the conversion to natural gas as proposed by Con Gas economically feasible?

a. What is the cost of safely converting the Con Gas system to natural gas?

b. What is the cost of connecting Con Gas' system to FGT's system and who should bear this cost?

(i) What facilities are required for the connection and what is their cost?

(ii) Does FGT's tariff require a contribution in aid of construction?

(iii) If Con Gas is required to make a contribution, how will investment tax credits be treated?

c. Would Con Gas' customers benefit by the substitution of natural gas for propane gas service?

4. Does Con Gas' management have the technical and financial capability of providing natural gas service?

5. Is there a better alternative to serving the market proposed to be served by Con Gas?

6. Assuming the Con Gas proposal is found to be in the public interest, what volumetric entitlement should be established for Con Gas and how should it be derived?

Administrative Procedure Act 5 U.S.C. § 706 (1982)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Commission's Regulation—18 C.F.R. § 154.39 (1988)

§ 154.39 General terms and conditions.

(a) This section shall contain provisions which apply to all or any of the rate schedules and which may more conveniently be arranged in a separate section of the tariff. Subsections and paragraphs shall be numbered for convenient reference.

(b) The general terms and conditions of the tariff shall contain a statement of the company's policy with respect to the financing and/or construction of sales laterals serving resale customers. For the purposes of this section, the term "sales lateral" is defined as any pipeline extension (other than a main line extension) built from an existing pipeline facility to deliver natural gas to one or more customers of the company inclusive of both new and present purchasers, and, for present purchasers, inclusive of new delivery points and enlargements or replacements of present sales lateral pipelines.

(1) If it is the company's policy to build or contribute to the construction of any sales laterals to resale customers, the statement shall contain the following elements:

(i) An explicit statement in measurable quantitative terms (e.g., estimated revenues, estimated cost of service, estimated sales volumes, pipeline system capacity, or other specific quantitative factors) of the method(s) or formula(s) by which the company determines the amount of its or the purchaser's contribution to the construction of any sales lateral pipeline. If the company's policy contemplates subsequent adjustment of initial contributions to construction to reflect actual operating experience, the statement shall set forth the method by which the adjustment is computed, and shall indicate *(a)* when the adjustment is determined, and *(b)* how the company disburses or collects additional contributions. The statement required by this subparagraph shall be formulated so as to facilitate ready computation of the respective contributions to sales lateral construction of the pipeline company and its purchaser. Reference to imprecise criteria (e.g., "economic feasibility") will be unacceptable.

(ii) The following statement: "Nothing in this policy statement shall require (the company) to file an application for a certificate of public convenience and necessity under section 7(c) of the Natural Gas Act. Nothing in this policy statement, further, shall prevent (the company) from contesting an application for service filed pursuant to section 7(a). (The company) reserves the right to seek a waiver of the policy set forth herein, for good cause shown, during any proceeding before the Commission instituted under section 7 of the Natural Gas Act."

(2) If it is the company's policy not to build or contribute to the construction of any sales laterals to resale customers, the policy statement shall read as follows: "(The company) will not build or contribute to the cost of building any sales lateral pipelines to resale customers." This statement shall be followed by the provision required by paragraph (b)(1)(ii) of this section.

(Secs. 5, 7, 52 Stat. 823, 824; 15 U.S.C. 717d, 717f)

[Order 328, 31 FR 13721, Oct. 25, 1966, as amended by Order 365, 33 FR 10140, July 16, 1968]

Section 4 of The Natural Gas Act
15 U.S.C. § 717c

§ 717c. Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate

accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 7 of the Natural Gas Act 15 U.S.C. § 717(a) (1982)

§ 717f. Construction, extension, or abandonment of facilities; certificate of convenience and necessity; condemnation proceedings.

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

Section 19 of the Natural Gas Act 15 U.S.C. § 717r(a) (1982)

§ 717r. Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

Supreme Court, U.S.
FILED
SEP 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-311

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT FLORIDA GAS TRANSMISSION CORPORATION IN OPPOSITION

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September 15, 1989

QUESTIONS PRESENTED

1. Does Section 19(b) of the Natural Gas Act ("NGA") bar consideration of Petitioner's claim?

2. Does an administrative agency or a reviewing court commit reversible error by not discussing one of Petitioner's arguments when the decisionmaker already has found (without challenge herein by Petitioner) that granting the relief requested will violate the NGA prohibition against granting undue preferences?

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BRIEF OF RESPONDENT FLORIDA GAS TRANSMISSION CORPORATION IN OPPOSITION

STATUTES INVOLVED

In addition to the provisions cited by Petitioner, Section 19(b) of the NGA, 15 U.S.C. § 717r(b) (1982), also is relevant to the issues herein. This section is reproduced in the Appendix hereto.

STATEMENT OF THE CASE

The controlling facts are adequately set forth in the two opinions of the court below. Appendix A-2 through A-6, A-25 through A-27. Respondent Florida Gas Transmission Company ("FGT") provides the following additional information in response to assertions of the Petitioner.

Petitioner has not fairly and accurately described the district court decision on which it relies. In *Consolidated Gas Co.* v. *City Gas Co.*, 665 F.Supp. 1493 (S.D. Fla. 1987), *aff'd*, 880 F.2d 297 (11th Cir. 1989), the district judge did not find that the Federal Energy Regulatory Commission's ("FERC") "position is in violation of the antitrust law." Petition at 11. Nor did he conclude that "the agency decision is an insurmountable obstacle to competition." *Id.*

The district judge did not attack the FERC's decision in any respect, apparently accepting that decision as a valid exercise of the FERC's authority under the NGA. Based on the facts before him, the district judge did state that Petitioner's payment of the costs of interconnection with FGT caused him to have "grave doubt" that Petitioner's proposed natural gas operations could have been competitive, 665 F.Supp. at 1534, and that such payment "would potentially have made [Petitioner] uncompetitive." *Id.* Nothing in the opinion, however, approaches the types of findings asserted by Petitioner.

Moreover, whatever findings the district court record may have supported, Petitioner took a different position before the FERC. Indeed, Petitioner contended throughout the FERC proceedings that its proposed conversion from propane to natural gas service would be financially and economically feasible whether or not it was required to pay the costs of connecting to FGT. *See, e.g., Consolidated Gas Co.* v. *Florida Gas Transmission Co.*, FERC Docket No. CP82-342-000 (Motion for Stay of Order, filed Jan. 24, 1985), at 2.

Even assuming that the district court's opinion bears on the validity of the decisions below, Petitioner has been awarded full compensation for any actual damages from competitive injuries resulting from the acts complained of, and that award has been trebled pursuant to the antitrust laws. The result of granting the relief Petitioner seeks herein would be yet another recovery for the same acts.

REASONS FOR DENYING THE PETITION

1. The Court Below was Not Authorized to Consider Petitioner's Claim

Petitioner never presented to the FERC the alleged error that it now claims warrants exercise of the Court's jurisdiction. Section 19(b) of the NGA bars consideration by a reviewing court of any claim not raised in an application for rehearing filed with the FERC absent a "reasonable ground for failure to do so." 15 U.S.C. § 717r(b) (1982). The fact that the district court's opinion was issued after Petitioner filed its application for rehearing does not provide such a "reasonable ground." Petitioner had ample opportunity to present its arguments regarding the alleged effect of the district court's opinion and failed to do so. For example, prior to the FERC's decision on rehearing, Petitioner could have, but did not, file a supplement to its application for rehearing or lodge the district court opinion with the FERC, together with an explanation of its alleged relevance.[1] After rehearing was denied, Petitioner did not exercise its option to seek FERC reconsideration of the order on rehearing and did not avail itself of the opportunity provided by Section 19(b) of the NGA to seek a court of appeals' remand for the presentation of additional evidence. Under these circumstances, and given Section 19(b)'s express terms, the failure of the court below to address the issue does not give rise to an error warranting issuance of a writ of certiorari.

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[1] Providing a courtesy copy to lower level FERC staff, Petition at 7, obviously does not satisfy the statutory requirement.

2. Petitioner Did Not Raise the Issue It Presents Herein to the Court Below

Even in the court below, Petitioner did not urge, as it does here, that the district judge had found the FERC's decision to have an anticompetitive effect. Instead, Petitioner cited the district court opinion as support for its claim that requiring Petitioner to pay for the costs of interconnecting with FGT would unduly discriminate against Petitioner by placing it at a competitive disadvantage compared to other FGT customers, including the defendant in the antitrust case, whom FGT connected to its system at little or no charge in the 1960's and early 1970's. That argument—resolution of which involved issues of tariff construction and the application of NGA standards—was rejected by the FERC and the court below. Apparently recognizing the futility of pursuing that issue before this Court, Petitioner does not challenge those determinations herein, Petition at 15, and instead has pursued a new avenue of attack. Issuance of a writ to review such a newly formulated claim is inappropriate.

3. The Traditional Reasons for Issuing a Writ are not Present

This case presents no conflict between the decision below and decisions of either other courts of appeals or this Court. There are no constitutional or federal statutory issues, or any general issues of overriding importance raised by the Petition. There are no similar issues pending in other cases before the Court. Furthermore, the issues below will not arise again. The defective tariff language that gave rise to Petitioner's claim below has been corrected. App. at A-14.

In short, the Petition suggests no valid reason to extend further the tortured history of this case. Petitioner has not succeeded in shifting the costs of connection from itself to FGT and its existing customers, notwithstanding detailed review of its claims in four FERC decisions and two opinions of the court below. The result of these cases is fair and

consistent with longstanding principles of administrative decisionmaking and appellate review. Therefore, no purpose would be served by issuance of a writ.

4. The FERC has no Authority to Grant the Relief Petitioner Seeks

The NGA specifically precludes FERC action that would create an undue preference for any customer or group of customers. Section 4(b) of the NGA, 15 U.S.C. § 717c(b) (1982). App. at A-63. The FERC held—and was affirmed by the court below—that a decision requiring FGT and its other customers to pay for Petitioner's connection to FGT would "confer an undue preference on new customers [like Petitioner] over the existing cusotmers." App. at A-10 (footnote omitted.) Petitioner specifically states that it is not challenging either the FERC's decision on this issue or the affirmance thereof by the court below. Petition at 15. Because granting the relief Petitioner seeks would create exactly the same undue preference already found unlawful, that relief is clearly beyond the FERC's power and no benefit would be gained from a remand.

Finally, Petitioner is asking that FGT and its customers pay the costs of interconnection because of alleged harm caused by allegedly anticompetitive acts of one FGT customer. This request is not only illogical on its face but also constitutes a claim against FGT and its customers for damages. The FERC has no authority to award damages. That is the province of the courts.

CONCLUSION

For the above reasons, the Petition should be denied.

Respectfully submitted,

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September 15, 1989

APPENDIX

Section 19(b) of the Natural Gas Act,
15 U.S.C. § 717r(b)(1982)

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgement and decree of the court, affirming, modifying or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

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No. 89-311

In the Supreme Court of the United States

OCTOBER TERM, 1989

CONSOLIDATED GAS COMPANY OF FLORIDA, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld the decision of the Federal Energy Regulatory Commission requiring petitioner, an owner and operator of an underground propane gas distribution system seeking to convert its system to natural gas, to pay for the lateral line connecting its system to an interstate pipeline's natural gas distribution system.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A6) is unreported. The order of the Federal Energy Regulatory Commission requiring petitioner to finance the lateral line (Pet. App. A13-A23) is reported at 38 F.E.R.C. ¶ 61,317. The order of the Federal Regulatory Energy Commission denying rehearing (Pet. App. A7-A12) is reported at 42 F.E.R.C. ¶ 61,271. An earlier opinion of the court of appeals remanding the case to the Federal Energy Regulatory Commission (Pet. App. A24-A27) is unreported. The initial order of the Federal Energy Regulatory Commission (Pet. App. A31-A35) and its order denying rehearing (Pet. App. A28-A30) are reported at 28 F.E.R.C. ¶ 61,350, and 29 F.E.R.C. ¶ 61,205, respectively.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1989. A petition for rehearing was denied on May

17, 1989. Pet. App. A1. The petition for a writ of certiorari was filed on August 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Consolidated Gas Company of Florida, Inc., an owner and operator of an underground propane gas distribution system, sought to convert its system to natural gas. Petitioner therefore filed an application with the Federal Energy Regulatory Commission requesting that the Commission order Florida Gas Transmission Company (FGT), an interstate pipeline, to sell quantities of natural gas annually to petitioner through a lateral line connecting the two systems. Petitioner also sought an order requiring FGT to construct and pay for that lateral line, at an estimated cost of $250,000.

The Commission, under Section 7(a) of the Natural Gas Act (NGA), 15 U.S.C. 717f(a),[1] ordered FGT to provide service to petitioner through a new lateral line. The Commission, however, declined to order FGT to bear the costs of construction, interpreting FGT's tariff as requiring any customer, such as petitioner, to reimburse the pipeline for the cost of connecting that customer to FGT's system. This case involves petitioner's challenge to that part of the Commission's order requiring petitioner, as opposed to FGT, to pay for the lateral line connecting petitioner's system to FGT's interstate pipeline system.

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[1] Section 7(a) of the NGA, 15 U.S.C. 717f(a), authorizes the Commission to order an interstate pipeline to sell natural gas to and "establish physical connection of its transportation facilities with the facilities of" a distributor if such action will not impose an "undue burden" on the pipeline and will not "impair its ability to render adequate service to its customers."

1. In 1983, after an evidentiary hearing on petitioner's Section 7(a) application, the Administrative Law Judge issued his initial decision granting the request to order FGT to interconnect with and provide natural gas service to petitioner. Pet. App. A36-A60. The ALJ agreed with petitioner that FGT must pay for the new lateral line. The ALJ found that although FGT's tariff expressly requires any existing customer to pay for the construction of a new lateral line, it did not speak to requirements for new customers. Since the Commission's regulations require that a pipeline's tariff provide explicitly whether the pipeline or the customer will pay for new lateral lines, the ALJ concluded that FGT must absorb the cost. Pet. App. A46-A47.[2]

In 1984, the Commission upheld the ALJ's decision ordering FGT to provide service to petitioner, but reversed his order requiring FGT to pay for the lateral line. Pet. App. A31-A35. The Commission agreed with the ALJ that FGT's tariff imposes lateral construction costs on existing customers and does not speak to requirements for new customers. The Commission assumed, however, that this omission showed that a new customer such as petitioner

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[2] The ALJ took note of petitioner's pending federal court litigation against City Gas Company of Florida (City Gas), another distribution customer of FGT. In that action, petitioner alleged that City Gas had violated federal antitrust laws by, among other actions, obstructing petitioner's conversion to natural gas and expanding its services to take away petitioner's customers. The ALJ acknowledged that antitrust violations are "germane to disposition of a section 7 application," Pet. App. A48, but found that

> [t]his record * * * does not contain details sufficient to evaluate this matter as a public interest factor which, if proved, would weigh in favor of approval of [petitioner's] application. * * * The pending court proceeding and the state regulatory body, in the circumstances present here, are more appropriate forums to explore the propriety of expansion by City Gas.

Ibid.

would also pay for a lateral line. Pet. App. A33. Any differential treatment of new and existing customers in this context would, in the Commission's view, be "unduly discriminatory against existing customers." *Ibid.* Accordingly, the Commission held that petitioner must pay for the costs of its new lateral line.

In 1986, the court of appeals reversed and remanded the case to the Commission for further proceedings with respect to petitioner's obligation to pay for the lateral line. Pet. App. A24-A27. The court agreed with the Commission that FGT's tariff "is silent as to whether new customers must pay for lateral line construction," and that, "in fill[ing] in a gap left by the tariff drafter," the Commission must "ensure that pipelines do not unfairly discriminate among customers." *Id.* at A26 (citing Section 4(b) of the NGA, 15 U.S.C. 717c(b)). The court, however, concluded that the Commission had not adequately explained its decision, namely, showing why FGT's paying for petitioner's lateral line would discriminate among its customers when FGT paid for many of its existing customers' lateral lines when they had become new customers. Pet. App. A26-A27.

2. On remand, the Commission interpreted FGT's tariff to require any customer, including a new customer like petitioner, to pay for the construction of new lateral lines. The Commission therefore adhered to its earlier decision requiring petitioner to pay for the lateral line connecting it with FGT's system. Pet. App. A13-A23.

The Commission found that FGT's former policy (contained in an earlier tariff) obligated the pipeline to pay only for lateral lines to begin service to new communities. That policy reflected market conditions under which FGT "eagerly sought to obtain new customers and market plentiful supplies of gas," thereby reducing the per-unit cost of service to its existing customers. Pet. App. A17. Under that policy, FGT "many years ago paid for all or a portion of the ini-

tial laterals constructed on behalf of the existing customers." *Ibid.*

The Commission further found that, as the natural gas market changed during the late 1970s and early 1980s, "it is not surprising that FGT decided to revise its * * * policy [as reflected in the tariff]." Pet. App. A17. Since FGT's system had become fully utilized by existing customers and since sales through new lateral lines would no longer reduce FGT's per-unit cost of service, FGT revised its policy to require any existing customer to pay for any new lateral line. The Commission determined that FGT's change in policy was "reasonable and within its legitimate managerial prerogative." *Ibid.* And, since the Commission found no economic or other material distinction warranting different treatment of FGT's new and existing customers, it therefore construed FGT's tariff to apply the changed policy to both new customers, such as petitioner, and existing customers. *Ibid.*

3. Petitioner filed an application for rehearing before the Commission, principally contending that the Commission's interpretation of FGT's tariff is "*ultra vires* * * * because it retroactively creates a non-existing obligation (i.e., requiring a new customer to pay for its lateral line construction) on the pretense of preventing an undue discrimination against the existing customers, who, under [FGT's tariff], were explicitly required to pay for their lateral construction." Pet. App. A9.

In July 1987, after petitioner had requested rehearing (but before the Commission issued its decision), petitioner prevailed in its antitrust action against City Gas. *Consolidated Gas Company of Florida, Inc.* v. *City Gas Company of Florida, Inc.*, 665 F. Supp. 1493 (S.D. Fla. 1987), aff'd, 880 F.2d 297 (11th Cir. 1989); see note 2, *supra*. In that action, the district court held that City Gas had willfully acquired and maintained monopoly power in the relevant

natural gas market in violation of the Sherman Act and the Clayton Act. See 665 F. Supp. at 1515-1523, 1532-1542 (finding that City Gas injured petitioner by, among other actions, refusing to negotiate reasonable rates for the sale and transportation of natural gas to petitioner). Based on the record presented at trial, the district court observed that "[t]here is grave doubt as to whether [petitioner] could have effectively competed with City Gas" if petitioner had obtained natural gas directly from FGT and paid the cost of the connecting lateral. *Id.* at 1534.

In March 1988, the Commission denied petitioner's application for rehearing. Pet. App. A7-A12.[3] The Commission reiterated its refusal to "interpret [FGT's tariff's] silence on the lateral line payment obligations of new customers in such a manner as to require FGT to pay for the lateral construction cost of the new customers." *Id.* at A10. "Such an interpretation," the Commission determined, "would clearly confer an undue preference on the new customers over the existing customers, because existing customers would have to pay for lateral while new customers would not." *Ibid.*

4. The court of appeals denied the petition for review. Pet. App. A2-A6. The court accepted the Commission's rationale for interpreting FGT's tariff so as to treat new and existing customers the same, *i.e.*, by requiring both types of customers to pay the costs of a new lateral, even though FGT in the past had borne such costs:

> When a natural gas transmission pipeline is engaged in a major expansion, it will provide inducements in

[3] As petitioner concedes (Pet. 7), it never requested the Commission to consider the relevance of the district court's decision in *Consolidated Gas Company of Florida, Inc.* v. *City Gas Company of Florida, Inc.*, *supra*, with respect to the issue pending before the Commission—whether FGT's tariff should be interpreted to require petitioner to pay for the lateral line.

> order to tie new markets into its system; at the same time, its ability to spread the cost of a major expansion over a larger base of customers will enable it to achieve savings in the unit price of the gas it sells. When a pipeline is operating at capacity, however, the addition of a new customer will not accrue to the benefit of the system as a whole, and pipeline management may properly expect a new customer to absorb the full cost of the service it seeks.

Id. at A6.[4]

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review of petitioner's contentions regarding the proper construction of FGT's tariff is not warranted.

Petitioner contends (Pet. 11-15) that the Commission, although obligated by the NGA to take into account antitrust considerations, failed to consider the pertinent findings of the district court, entered in the separate antitrust action, that requiring petitioner to pay for a lateral line would impose "an insurmountable obstacle to competition." Pet. 11. Petitioner, however, did not raise this issue before either the Commission (see note 3, *supra*) or the court of appeals, and it has therefore not preserved it for review. *E.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In the court of appeals, petitioner argued that the Commission's order would "prejudice [its] effort to regain

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[4] To the extent the Commission's decision rested on its view that FGT's tariff should not be read to impose presumptively discriminatory treatment among customers, the court of appeals rejected the Commission's view. Pet. App. A5-A6. Petitioner has not sought further review of this aspect of the court of appeals' judgment.

customers lost to [its] competitor, City Gas * * *." Pet. C.A. Reply Br. 15. Petitioner, however, explained that its "reference to the United States District Court finding to that effect was merely to confirm that an objective court saw what an allegedly expert agency refuses to see." *Id.* at 17. Thus, by asserting that its anticompetitive claim "had been adequately documented in the record and in the pleadings [before the Commission]," *id.* at 15, petitioner certainly never urged the court of appeals to consider, let alone be bound by, the findings made in the separate district court action.

In any event, neither the Commission nor the court of appeals had any basis for considering the record presented in the independent antitrust action.[5] Under established administrative law principles, the Commission must rule on an application for service, such as petitioner's request for service by FGT, based on substantial evidence in the record presented to the Commission. *E.g., Electricity Consumers Resource Council* v. *FERC*, 747 F.2d 1511, 1513-1514 (D.C. Cir. 1984); *City of Charlottesville* v. *FERC*, 661 F.2d 945, 949-950 (D.C. Cir. 1981), cert. denied, 475 U.S. 1108 (1986). Here, petitioner presented insufficient evidence to the Commission in support of its asserted claim that a rejection of its application would exacerbate the alleged antitrust violations committed by City Gas. See, *e.g.*, Pet. App. A48. And the Commission specifically found that even if petitioner paid for the lateral line, "there is enough of a reasonable likelihood that [petitioner] will retain its present customers and, therefore, be successful as a natural gas distributor

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[5] Petitioner never moved to include in the record before the Commission the evidentiary record that was before the district court. And, even after the district court issued its decision in July 1987, petitioner never requested the Commission to reopen the administrative record or to reconsider its orders in light of that decision. See also note 3, *supra*.

* * *." *Id.* at A32; see *id.* at A50-A51 (ALJ's findings concerning petitioner's ability to compete with City Gas). Indeed, in seeking a stay of the Commission's order, petitioner has already conceded that "conversion of [its] system to natural gas by a direct connection to the FGT system will be financially and economically feasible, no matter which way the Court rules [with respect to the issue whether petitioner must pay for the lateral line]." Pet. Mot. For Stay of Order 1-2, Docket No. CP82-342 (Jan. 24, 1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1989

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* The Solicitor General is disqualified in this case

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v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Petitioner, Consolidated Gas Company of Florida, Inc. (Consolidated) files this Reply to Briefs opposing *certiorari* filed by Respondent, Federal Energy Regulatory Commission (Commission) and Intervenor, Florida Gas Transmission Company (FGT).

The Court's attention is called to the fact that the District Court decision in *Consolidated Gas Company of Florida, Inc. v. City Gas Company of Florida, Inc.*, 665 F. Supp. 1493, has been affirmed by the Eleventh Circuit at 880 F.2d 297 (1989).

THE ANTICOMPETITIVE ISSUE

Neither of the Respondents attempt to defend or justify the Commission's failure to rationalize the anticompetitive effect of its order. Instead, the Commission and FGT present, as their principal arguments, a claim that Consolidated did not "preserve" its claim of anti-competitive impact before the Commission or before the Court of Appeals and, consequently, cannot raise the issue here.

Such arguments are absurd. This entire case is about obstructions to fair competition and the Commission was aware of that aspect of the case throughout the proceeding. When City Gas Company (City Gas) began to solicit Petitioner's customers, Petitioner sought to preserve its competitive position in its market by requesting a natural gas supply from FGT on the same terms made available by FGT to Consolidated's competitor, City Gas, that is, a city-gate delivery of natural gas at the FGT tariff rate. FGT raised a major obstacle—Consolidated must agree to pay the cost of the connecting facilities (contribution in aid of construction or CIAC)—an obstacle City had never had to meet. Consolidated sought relief from the Commission by filing its appplication pursuant to Section 7(a) of the Natural Gas Act. City Gas intervened and attempted to block Consolidated's access to natural gas. FGT obliged City Gas, its second largest resale customer, by demanding a CIAC from Consolidated even though FGT's tariff did not require a CIAC from a new customer.[1] While the Commission delayed the administrative proceeding, City Gas in-

[1] FGT states: "The defective tariff language that gave rise to Petitioner's claim below has been corrected." (FGT Br., p. 4)

vaded Consolidated's service area and attached all of its commercial customers, the cream of its market. When the Commission finally acted, it imposed the unjustified condition in its order requiring Consolidated to pay a CIAC that was greater than 50% of Consolidated's total net investment in its plant. That condition has been the subject of continuing litigation since 1984.

Thus, the anti-competitive effect of a requirement that Petitioner reimburse FGT for the cost of the facilities required to connect the FGT pipeline to Petitioner's system has been present in this case from its inception to the present time. The antitrust proceeding was initiated while the administrative proceeding was in progress, and the Commission knew it. (A-59, ftn. 13) In a Motion For Prompt Hearing filed February 4, 1983, Consolidated pointed out that City Gas was continuing to raid Consolidated's market in an effort to undermine the economic feasibility of Consolidated's investment and that the delay in setting the matter for hearing was allowing City Gas to destroy Consolidated. In its Initial Brief, Consolidated argued:

> Over the years, the Commission (and its predecessor) have seen many prolonged cases where coal interests, petroleum interests and maritime interests have used and abused the administrative processes of this Commission. City is following a similar path. It is attempting to use the hearing procedures of this Commission to block or at least delay access by a competitor to a supply of competitively priced wholesale service. The use of monopoly power to maintain a competitive

> advantage or to destroy a competitor is unlawful. *United States v. Griffith*, 334 U.S. 100, 107 (1948). This Commission should not tolerate such predatory, non-competitive actions. *Cf.*, *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

In his Initial Decision the ALJ observed that:

> Fleisher also testified that the application should be granted so that the Commission does not 'aid and abet' the anti-competitive efforts of City Gas. (A-48)

The ALJ's decision gave Consolidated a supply of gas on competitive terms, ruling that FGT's tariff did not require a contribution, that FGT's tariff did not contain the express language required by Commission regulations if a contribution was to be required and that absorption of the cost of the lateral by FGT was in the public interest. (A-46-47) When the Commission overruled the ALJ and required Consolidated to pay the full cost of the connecting lateral and meter station, despite the fact that FGT's "defective" tariff did not require such a contribution by new customers, and City Gas had not paid any connection fee, the Commission *aided and abetted* City Gas' destructive invasion of Consolidated's market.

The anti-competitive nature of the Commission's condition was called to the Commission's attention in Petitioner's Application for Rehearing, after the Court's remand, when Petitioner stated:

> There was no showing that Consolidated's competitors will be harmed if FGT bears the

> cost of the lateral; *indeed the record demonstrated that imposing the cost of the lateral on Consolidated would severely impair its ability to compete with City Gas Company* in an effort to recover the commercial and residential customers taken from Consolidated by City Gas Company while this case was stalled in litigation (JA 167) (Emphasis added)
>
> * * *
>
> During that 5 year period of bureaucratic delays, City Gas Company (which has 11 laterals connecting its system to the FGT system, all constructed at FGT's expense) took over all of Consolidated's commercial customers and some residential customers seriously impairing Consolidated's revenue stream. The Commission's dilatory action in its Opinions 225, 225-A, and 225-B have injured both Consolidated and the consuming public. (JA 171-2)

This objection stated in Petitioner's Application clearly identified the anticompetitive issue demanding Commission attention as required by Section 19(a) and (b) of the Natural Gas Act. The Commission's obligation to justify the anticompetitive effect of its order is a direct legal obligation. Consequently, it was not necessary to formally request the Commission to consider the District Court's antitrust decision.

Petitioner's Initial Brief to the United States Court of Appeals included a five page discussion under the heading:

"(e) *The Commission's Order is Anti-Competitive*"

In that discussion, Petitioner argued:

> The Commission's action of imposing the cost of the connecting lateral on Consolidated when the competing dominant seller in the area, City Gas, received numerous supply laterals at the pipeline's expense, would severely prejudice Consolidated's competitive position. (Initial Br., p. 27)
>
> * * *
>
> A common predatory strategy occurs where regulatory action is required for entry into a market. An incumbent firm (City Gas) can increase the cost of entry for a new firm (Consolidated) by vigorously contesting the required regulatory approval. In the instant case, not only did City Gas succeed in imposing a significant litigation cost and delay of entry upon Consolidated; the Commission assisted City Gas by imposing on Consolidated the cost of the connecting lateral required for Consolidated to enter the natural gas market, despite the fact that City Gas receives city gate service from FGT at FGT's expense.
>
> The Commission's reasoning is sheer nonsense. The concept of a "level playing field" on which competitors can compete on equal terms has been adopted time and again by this Commission. Yet its ruling in this case tips the playing field radically against Consolidated and gives its competitor an unfair advantage. Far from demonstrating that allowing Consolidated to receive its lateral at

> the pipeline's expense would grant a cost advantage to Consolidated and do competitive harm to City Gas, the facts demonstrate that imposing the cost of the lateral on Consolidated will inflict significant competitive harm on Consolidated. (Initial Br., p. 30)

Petitioner called to the Court's attention the fact that the U.S. District Court had ruled that "City Gas, a monopolist controlled an essential facility" (Initial Br., p. 27) and that the District Court had concluded that "Consolidated would have encountered a prohibitive transportation problem" and that imposing the cost of the lateral on Consolidated created a "grave doubt as to whether Consolidated could have effectively competed with City Gas." (Initial Br., p. 28) Finally, Petitioner concluded that:

> The condition imposed is anti-competitive and without any substantial support in the record. (Initial Br., p. 33)

Consequently, although no extensive "legal" argument addressing the anti-competitive impact of the Commission's order was made before the Commission or the Court of Appeals, the factual argument that the Commission's order was prejudicially anti-competitive was clearly stated in the Application for Rehearing and is properly before this Court. The Commission is presumed to be an expert body with a full knowledge and understanding of its legal obligations. One of those obligations is to conduct its responsibilities in consonance with national policies favoring competition. The Commission can impose a condition having anticompetive effects, but it must find another overriding public policy in order to jus-

tify an anticompetitive condition. There was no such finding nor is there any factual basis for such a finding in this case. The Commission simply acted arbitrarily and capriciously in flagrant violation of its obligations when it imposed an anticompetitive condition on Petitioner.

Although the objection to the Commission's order that it was anticompetitive was raised in Consolidated's Application For Rehearing after remand, in accordance with Section 19(a) and (b) of the Natural Gas Act (15 U.S.C. §§ 717(a) and (b), the Court of Appeals, for reasons unknown, chose not to address the issue. That unexplained failure to rule on an issue squarely before the Court was a clear error.

INTERPRETATION OF FGT'S TARIFF

FGT renews the argument that its admittedly "defective" tariff, if read literally, was unduly discriminatory in requiring existing customers to pay a CIAC but not requiring a new customer to make such a payment and that FGT should not be bound by its own tariff. (FGT Br., p. 5) The Commission adopted that (erroneous) argument and compounded its error by "construing" the tariff to require new customers to pay a CIAC which the tariff did not require. (J.A. 154, 155) The U.S. Court of Appeals explicitly rejected that justification for the Commission's decision (A-6). Consequently, FGT's argument that Section 4(b) of the NGA (which proscribes undue discrimination) precludes agency action requiring FGT to bear the cost of the lateral to a new customer was explicitly and properly rejected by the Court of Appeals.

Both Respondents quote a statement from Petitioner's Motion For Stay of Order as a basis for

denial of *certiorari*. All that that statement of counsel said was that if the Court upheld the Commission's condition and Consolidated had a choice of paying the CIAC in order to retain its remaining customers or of losing the entire value of its existing investment, Consolidated would pay the CIAC in order to remain in business. That was no concession that the CIAC would not be an extraordinary burden on Consolidated's competitive position.

CONCLUSION

This Commission has made a great show in recent years of its commitment to pro-competitive policies and "level playing fields" as it forces a restructuring of pipeline services. But, in this case, where the Commission's action would have a direct anticompetitive effect on a small entity trying to maintain its market against a large dominant entity engaged in driving Petitioner out of business, the Commission totally ignored those policies, ignored the literal terms of an applicable tariff, ignored the express requirements of its own regulations, and imposed an anticompetitive condition without any foundation.

Such willful disregard of statutory responsibilities should not be allowed to stand. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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